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THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

FRANCIS NEWARK,

BARRISTER-AT-LAW.

1946

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MEMORANDA.

1943.

6 November. The Hon. Robert Dick Megaw, a Justice of His Majesty's High Court of Justice in Northern Ireland, Chancery Division, resigned.

20 November. Arthur Black, Esq., K.C., Recorder of Belfast, was appointed to be a Justice of His Majesty's High Court of Justice in Northern Ireland, Chancery Division, in the place of the Hon. Mr. Justice Megaw, resigned.

1944.

7 October. The Rt. Hon. Thomas Watters Brown, a Justice of His Majesty's High Court of Justice in Northern Ireland, King's Bench Division, died this day.

2 November. The Rt. John Clarke MacDermott, K.C., M.P., Attorney-General for Northern Ireland, was appointed to be a Justice of His Majesty's High Court of Justice in Northern Ireland, King's Bench Division, in the place of the Rt. Hon. Mr. Justice Brown, deceased.

3 November. The Rt. Hon. William Lowry, K.C., M.P., was appointed to be Attorney-General for Northern Ireland.

28 November. The Rt. Hon. Sir William Moore, Bart., formerly Lord Chief Justice of Northern Ireland, died this day.

1945.

3 December. The Rt. Hon. Edward Sullivan Murphy, a Lord Justice of Appeal of His Majesty's Court of Appeal in Northern Ireland, died this day.

1946.

15 March. Samuel Clarke Porter, Esq., K.C., was appointed to be a Lord Justice of His Majesty's Court of Appeal in Northern Ireland in the place of the Rt. Hon. Lord Justice Murphy, deceased.

Lord Chief Justice:

The Right Hon. Sir James Andrews, Bart.

Lords Justices of Appeal:

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The Hon. Samuel Clarke Porter.

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The Hon. Arthur Black.

King's Bench Division:

The Right Hon. John Clarke MacDermott.

Attorney General:

The Right Hon. William Lowry, K.C., M.P.

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ERRATUM.

Page 93, line 8—for " question 1 (*b*) " read " question 1 (*a*) "

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CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

IN RE B., AN INFANT (1).

K.B.D. (Crown Side.) 1945.

Feb. 26, 27; Mar. 28.

Infant—Custody—Habeas Corpus—Welfare of child chief consideration—Husband and wife de facto separate—Conflicting claims advanced by both parents—Nothing in conduct or wishes of either parent to lead to any preference between them—Rights of father at common law—Paramount right of father to custody—Guardianship of Infants Act, 1886 (49 & 50 *Vict.*, *c.* 27), *section* 5.

A husband whose wife had left him and subsequently removed their child from his custody applied to the court by way of habeas corpus for the child's custody. There was nothing in the conduct or wishes of either parent to lead to any preference between them, or to enable the court to say that either was unfitted to be entrusted with the custody of the child.

Held, by the King's Bench Division (Black and MacDermott JJ.) that in the circumstances of the case the child's welfare would best be served by restoring him to the custody of his father.

Held, further, that the father had superior rights at common law, that these rights had not been completely abrogated by the Guardianship of Infants Act, 1886, section 5, and that on this ground also the father was entitled to the custody of the child.

Campbell v. Campbell [1920] S.C. 31 and *Mackellar v. Mackellar* (1898) 25 R. 883, followed.

MOTION to make absolute a conditional order of habeas corpus.

(1) In the King's Bench Division before Black and MacDermott JJ.

K.B.D. (Crown Side.) 1945.

IN RE B., AN INFANT.

The applicant and respondent were respectively husband and wife and were parents of a boy aged eleven years whose custody was the subject matter of the application. The applicant and respondent were married in 1931 and the boy, the only child of the marriage, was born in 1934. Relations between the applicant and respondent became strained and in September, 1944, the respondent left the applicant and went to live with her sister, the boy remaining in the custody of the applicant. The applicant made provision for the upbringing and education of the boy by placing him in the care of the applicant's brother in whose home he was treated as one of the family. While living there he attended school regularly and was visited by the applicant at every week end. In January, 1945, the respondent called at the boy's school, and without the consent or knowledge of the applicant took the boy with her to the home of her sister. The applicant thereupon obtained a conditional order of habeas corpus directed to the mother, and applied to have the order made absolute notwithstanding cause shown.

The case is reported only on the question of the extent to which a father's rights at common law have been abrogated by the Guardianship of Infants Act, 1886, section 5.

Topping for the applicant :—

The father had rights superior to those of the mother at common law. These rights still exist ; they have not been completely abrogated by section 5 of the Guardianship of Infants Act, 1886, and they cannot be left out of consideration. The father's right to custody may be substantially modified but it is not completely abolished.

[He referred to *In the Matter of E. E. L., an Infant* (1), *In re O'Hara* (2), *In re Mitchell* (3).]

Chambers K.C. and *Kelly* for the respondent :—

(1) [1938] N.I. 56.
(2) [1900] 2 I.R. 232.
(3) [1937] I.R. 767.

We rely on the words used by Andrews L.C.J., in in *In re Brady Minors* (1), where he said: "The "authorities show that the rights of the parents "are equal, since the Guardianship of Infants Act, "1886, and the common law practice of regarding "the father as possessing a prior claim no longer "operates." The effect of section 5 of the Act of 1886 is to place the parents on an equal footing in the eyes of the law. The Court cannot go outside the considerations contained in the section.

In *In re O'Hara* (2), Lord Ashbourne said: "The circumstances must be very special which will "prevent a mother from obtaining the custody and "control of her child of only eleven years of age."

The dicta in *In re O'Hara* (2) have met with the approval of Andrews L.C.J., in *In the Matter of E. E. L., an Infant* (3).

There is no support for the view that the father is to have a preference over the mother.

Topping replied.

BLACK J. BLACK J. [after stating the facts continued:] It is well settled that on applications for the Writ of habeas corpus, where the real object is to determine who is to have the custody of a child, it is the duty of the Court since the passing of the Judicature Acts to proceed on the principles upon which the Court of Chancery acted. And it is also well settled that whether the father or the mother of the child be the applicant the Court should have regard to the considerations to which it is directed by the Legislature to have regard upon an application by a mother under the provisions of s. 5 of the Guardianship of Infants Act, 1886. The first and paramount consideration is the welfare of the child. To this all other considerations must be subordinated. But as prescribed by section 5 of the Act of 1886 the Court should also take into consideration the conduct of the parents and the wishes of the mother as well as of the father. As

(1) (1943) 77 I.L.T.R. 68, 69.
(2) [1900] 2 I.R. 232.
(3) [1938] N.I. 56.

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BLACK J.

regards these last-mentioned matters I do not think they help much to a solution in the present case. Each parent genuinely desires to have the custody of the boy. And having seen the parents and heard them in the witness box I do not think that either of them has been guilty of any conduct which would disentitle him or her to be entrusted by the Court with the custody of the child or that there has been anything in their conduct which would justify the Court giving a preference to either of them in regard to that custody. This being the position, we can address ourselves to the one question, what is the best course to take from the point of view of the welfare of the boy. As has been pointed out again and again the term "welfare" in this connection must be read in its largest possible sense. And I think that the Court must not only address itself to the child's present comfort and happiness but must also endeavour to look forward and try to consider what is ultimately best in the interests of the child. This will be found stated explicitly in the judgments of the Court of Session in the case of *M. v. M.* (1), but I think it is implicit in the many judgments in cases of this type where the Courts have considered and weighed the future prospects of the child in the competing custodies advocated by the contesting parties.

Here I should like to advert for a moment to a point which was raised during the argument. Suppose the Court found the considerations on either side to be equally balanced, nothing in the conduct of either parent to lead to any preference between them, and upon the most careful balance nothing to enable the Court to decide that it would be more in the interest of the welfare of the child that he should be entrusted to the custody of the one parent rather than of the other, what view in such circumstances ought the Court to take? There are undoubtedly dicta to be found in the books to the effect that since the Guardianship of Infants Act, 1886, the parents have been placed on a complete equality, but so far as I have been able to discover the precise point has never arisen for actual

(1) [1926] S.C. 778.

decision in any reported case either in England or in Ireland. So far as Great Britain is concerned the position is now made quite clear by section 1 of the Guardianship of Infants Act, 1925, which expressly places the parents on an absolute equality. It is difficult to see the necessity for this section if it simply enacts what had already been law since 1886. I am aware that the headnote of *In re Thain* (1) states that the English Court of Appeal in that case held that section 1 of the Act of 1925 introduced no new principle of law but merely enacted the rule which had hitherto been acted upon in the Chancery Division. *In re Thain* (1), however, was not the case of a contest between the child's father and the child's mother. The child's mother was dead. When the judgments in the case are examined it will be found that they do not at all bear out the statement which I have quoted from the headnote. The members of the Court are not addressing their minds at all to the position as between father and mother or to the portion of section 1 which places father and mother on an equality. It will be seen that all that they are stating is that the provision in section 1 which directs that the Court shall regard the welfare of the infant as the first and paramount consideration is no new law but merely sets out the rule which had been acted upon in the Court of Chancery.

The question, however, as regards the course which ought to be taken in a case where the Court found the considerations equally balanced was more than once discussed in Scotland by the Court of Session in cases which will repay careful perusal. The first case to which I would refer is *Mackellar v. Mackellar* (2). That case came before the Court upon a Petition by a mother under the Guardianship of Infants Act, 1886, for the custody of the children. A proof was directed and was taken by Lord McLaren. Lord McLaren formed the view that the fault of the actual separation lay at the door of the husband rather than of the wife but found that no misconduct was proved on the part of either parent such as to disqualify either from having

(1) [1926] Ch. 676. (2) (1898) 25 R. 883.

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BLACK J.

the custody of the children and that the evidence established no considerations affecting the welfare of the children to lead to either parent being refused the custody. In these circumstances it was held by the Court (Lord President Robertson, Lord McLaren, Lord Adam and Lord Kinnear) that the father could not be displaced from his position as guardian of the children. This case was approved and followed in 1920 by a Court consisting of the then Lord President (Lord Strathclyde), Lord Mackenzie, Lord Skerrington and Lord Cullen in *Campbell v. Campbell* (1), and as pointed out by Lord Mackenzie in this latter case the remarks of the Lord Chancellor (Lord Herschell) in *Stevenson v. Stevenson* (2) appear to recognize that in the absence of any other consideration it is the father who, *prima facie*, has the right to the custody of the children.

I am of course aware that when one gets behind the express statutory provisions of the Act of 1886 the historical background in Scotland differs from that in England and Ireland. Nevertheless in considering a case in which one has to have regard to the provisions of section 5 of the Act of 1886, I think these Scottish decisions afford useful guidance and will have to be given careful consideration if and when a case arises where in seeking to decide what is best from the point of view of the welfare of the child the balance appears to hang evenly between the custody of the father and the custody of the mother.

[His Lordship then proceeded to consider whether from the point of view of the welfare of the child the balance was in favour of leaving him in the custody of the respondent or of restoring him to the custody of the applicant and concluded that in all the circumstances of the case it would be more in the child's interest that he should be restored to the custody of his father.]

MACDERMOTT J.

MACDERMOTT J.: The case comes before us on habeas corpus. The principles to be applied, however,

(1) [1920] S.C. 31 (2) (1894) 21 R. 96 (H.L.).

are not peculiar to this Court. Since s. 28 (10) of the Judicature Act (Ireland), 1877, became law they are the principles which the mother would have invoked had she sought the custody of her child in the Chancery Division instead of taking him herself. They are the principles upon which the former Court of Chancery acted subject to such modification as the Legislature has effected. In this connection it may be observed that the only enactment referred to in argument before us was s. 5 of the Guardianship of Infants Act, 1886, which provides that upon the application of the mother the Court may make such order as to custody and access as it may think fit "having regard to the welfare of "the infant, and to the conduct of the parents, and "to the wishes as well of the mother as of the father." I shall have to revert to this statute at a later stage. At the moment and as prefacing a consideration of the facts it will suffice to say that I regard the following points of principle as well settled :—

1. The first and paramount consideration for the Court is the welfare of the child. This rule has its roots in the practice of the Court of Chancery. Decision and legislation have only served to strengthen and develop it. As Lindley L.J. said in *In re McGrath* (1) : "The dominant matter for the consideration of the "Court is the welfare of the child. But the welfare "of a child is not to be measured by money only, nor "by physical comfort only. The word welfare must "be taken in its widest sense. The moral and religious "welfare of the child must be considered as well as its "physical well-being. Nor can the ties of affection "be disregarded."

2. In an application for habeas corpus this Court should have regard to the provisions of s. 5 of the Act of 1886. See *In re E. E. L.* (2). Though s. 5 is expressly related to an application by the mother under that Act the relief which may be given ought not to depend on the technical nature of the proceedings or on which spouse has initiated them. As Lord Hobhouse said in *Smart v. Smart* (3), after a reference

(1) [1893] 1 Ch. 143, 148.
(2) [1938] N.I. 56.
(3) [1892] A.C. 425, 431.

K.B.D. (Crown Side.) 1945.

IN RE B., AN INFANT.

MACDERMOTT J.

to the powers of the Court on a mother's application under a Canadian statute similar to Talfourd's Act, "In this case it was the mother who had possession "of the children, and the father who was seeking to "get it; but the Court considered, and rightly, that "the result ought to be the same as if the parts were "reversed."

3. In having regard to the *conduct* of the parents under s. 5 of the Act of 1886 the Court should consider the spouses as of equal status and ignore the inequality of their rights at common law. I think that is the substance of the decision of the Court of Appeal in *In re A. and B.* (1).

[His Lordship then considered the facts of the case and concluded that in all the circumstances it would be in the child's interest that he should be restored to the custody of his father. His Lordship then continued :] There remains one matter on which I think it right to express an opinion, particularly in view of the fact that there is no grave disparity between the rival claims so far as the welfare of the child is concerned.

For the mother, Mr. Chambers contended that the effect of s. 5 of the Act of 1886 was to place the parents on an equal footing in the eyes of the law. The Court, as I understand his argument, is to confine itself to the considerations specified in the section and is not to look beyond them. On the other hand, Mr. Topping for the father urged that his client had superior rights at Common Law, that these had not been completely abrogated by statute and that they should, if necessary, be taken in to account.

At common law the father's right to custody was, of course, well-nigh absolute. The Court of Chancery, acting as *parens patriae* and treating the welfare of the infant as of primary importance, would disregard this right once it were shown that the father was unfit to remain the custodian or that his so remaining would be injurious to the child. But I think it is clear that the Court of Chancery recognized that the right to custody

(1) [1897] 1 Ch. 786.

was, prima facie, with the father. *De Manneville v. De Manneville* (1), *In re Flynn* (2). Indeed it would seem that the Court of Chancery had a considerable respect for this paternal right and would not pass it over lightly. See *In re Taylor* (3), where Sir George Jessel M.R. relates one motive for the introduction of Talfourd's Act to the refusal of the Courts "to deprive "the father of the custody of the child except in a very "extreme case of misconduct." It will be observed that this Act and the Infants Custody Act of 1873 were directed to the equitable jurisdiction and I regard the decisions upon them as indicating that, even where they applied, the father's ancient right to custody was regarded as substantially modified rather than entirely abolished. As Sir George Jessel put it in *In re Taylor* (3), "the law was altered by Talfourd's "Act to this extent, that that which was formerly the "absolute right of the father became, and is now, "subject to the discretionary power of the Judge."

It follows, therefore, that if in this country the common law right of the father has gone so as to leave both parents, prima facie, equally entitled to the custody of their infant children it must be as a consequence of the passing of the Act of 1886. The cases on this statute do not, in my opinion, decide this to have been its effect. Its provisions, no doubt, aimed at giving a mother much greater rights in respect of her child than she had ever enjoyed before. But I find nothing in them to show an intent to take from the father such rights as the due operation of the Act may leave undisturbed. It certainly does not purport to put the spouses in a position of absolute equality. Its provisions as to guardianship are expressly framed so as to recognize the husband's wider rights in this respect. And there is ample authority for the proposition that, notwithstanding the terms of s. 5 as to regarding the wishes of "as well the mother as the "father," the wishes of the latter for the religious upbringing of his offspring—a matter often bearing directly on the question of custody—will prevail over

(1) (1804) 10 Ves. 52.
(2) (1848) 2 De G. & Sm. 457.
(3) (1876) 4 Ch.D. 157, 159.

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those of the mother and yield only to what is requisite for the welfare of the child. See *In re Scanlan* (1), and *Ward v. Laverty* (2).

While the Act of 1886 went further than its predecessors of 1839 and 1873 its effect on the common law position was, to my mind, different only in degree. I do not think it has abolished the father's former rights root and branch. What it has done is to make them subject to the very wide discretionary power which it confers on the Court. The eclipse is substantial but it is not total. There is, in my opinion, still a residue of common law right in the father. It may only be a vestige, and it cannot prevail against the welfare of the child, but I think it is still there.

So far as I am aware this question has not been the subject of decision in Ireland or England, but support for the view I have expressed may be found in several Scottish cases. In *Campbell v. Campbell* (3), conflicting claims were advanced by both parents to the custody of a child of tender years and an argument very similar to that of Mr. Chambers was submitted on behalf of the mother. It was unanimously rejected, the Lord President (Lord Strathclyde) saying, after a reference to the views expressed by Lord McLaren in the cases of *Sleigh* (4), and *Mackellar* (5), "In the "former case Lord McLaren points out (at p. 275) "that 'while the statute gives to the Court a large "'discretion according to what appears to be the "'interest of the children, it does not alter the position "'of the father as head of the family. We, therefore, "'approach a case of this class with this fact to begin "'with, that the father is the guardian, and cannot be "'displaced from that position except on sufficient "'legal grounds.'" And later he adds: "So far as, "in this domain of law, one case can be said to rule "another, the case of *Mackellar* (5) appears to me to be "a precedent directly in point. With a slight variation "appropriate to the circumstances I adopt the words "of Lord McLaren there, and say that, there being no

(1) (1889) 40 Ch.D. 200.
(2) [1925] A.C. 101.
(3) (1920) S.C. 31.
(4) (1893) 30 S.L.R. 272.
(5) (1898) 25 R. 883.

" conduct alleged on the part of either party such as to " disqualify either parent from having the custody of " the child, and no considerations affecting the welfare " of the child to lead to either party being refused the " custody, I think that the father, who is by law the " guardian of the child during the joint lives of the " spouses, cannot be displaced from his position as the " guardian."

Were s. 1 of the Guardianship of Infants Act, 1925, applicable to this country or truly declaratory of the law as it then existed the position might be different. But this enactment does not apply to Northern Ireland. And I cannot regard it as declaratory in so far as it relates to the rights of the father at common law. The last paragraph of the headnote in *In re Thain* (1) appears to suggest the contrary but a reference to the judgments does not, in my view, justify such a wide pronouncement. I am of opinion that Lord Hanworth M.R. and Sargant L.J., in whose judgments alone a reference to s. 1 of the Act of 1925 appears, did not intend to say more than that that section, in so far as it provides that the Court " shall " regard the welfare of the infant as of first and para- " mount importance " was but stating the law as it had been.

I am accordingly of the opinion that even if the welfare of the child in this case were equally assured, whichever parent had his custody, the father would none the less be entitled to the relief which, for a different reason, I have already held he should have.

In the result the cause shown must be disallowed and the Writ will issue if need be.

Order absolute.

Solicitors for the applicant : *Peden & Reid.*

Solicitors for the respondent : *William Alexander & Son.*

J. McC.

(1) [1926] Ch. 676.

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May 3; June 20.

R. (PETTY) v. COUNTY COURT JUDGE OF DOWN (1).

Summonses for forfeiture of prohibited goods and penalty—Defendant resident in Eire—Served personally in Northern Ireland—Summonses dismissed—Notices of appeal sent by registered post to defendant at his address in Eire—Proof of service—"Ordinary course of post"—Customs Consolidation Act, 1876 (39 & 40 *Vict., c.* 36), *secs.* 186, 207—*Interpretation Act*, 1889 (52 & 53 *Vict., c.* 63), *sect.* 26—*Summary Jurisdiction and Criminal Justice Act* (*Northern Ireland*), 1935, (25 & 26 *Geo.* 5, *c.* 13), *sec.* 24.

A., who resided in Eire, was served personally in Northern Ireland with two summonses for dealing with prohibited goods contrary to the Customs Consolidation Act, 1876, sect. 186, and the Export of Goods (Control) (No. 10) Order, 1943. On 9th August, 1944, at Petty Sessions, the summonses were dismissed. On 12th August, 1944, letters addressed to the defendant at his residence in Eire and containing notices of appeal against the respective orders made at Petty Sessions were posted by registered post. The County Court Judge declined to hear the appeals on the ground that the service of the notices was not good service. The appellant obtained a Conditional Order of a Writ of Mandamus directed to the County Court Judge commanding him to enter continuances upon and hear and determine the appeals.

On motion to make absolute the Conditional Order notwithstanding cause shown,

Held, that in the absence of evidence of the ordinary course of post between Northern Ireland and Eire, service of the notices of appeal on the defendant had not been proved.

Service of notice of appeal under sect. 24 (3) (*m*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, on a person outside the jurisdiction considered.

MOTION to make absolute a Conditional Order of Mandamus notwithstanding cause shown by Edward Armstrong.

The facts are stated in the judgment of Murphy L.J.

(1) In the King's Bench Division before Murphy L.J. and Black J.

Nicholson K.C. and *McCall* for the complainant.

Patton K.C., and *Hanna* for Edward Armstrong.

MURPHY L.J.: This is an application by William Edwin Petty (an officer of Customs and Excise) as Prosecutor to make absolute a Conditional Order of Mandamus made by Mr. Justice MacDermott on the 23rd February, 1945, notwithstanding cause shown on behalf of Edward Armstrong of Nootka Lodge, Carlingford, County Louth.

The Prosecutor on the 14th July, 1944, caused a summons to be issued against the said Edward Armstrong charging him with an offence under section 186 of the Customs Consolidation Act, 1876, and the Export of Goods (Control) (No. 10) Order, 1943, in connection with a Lanz Bulldog Tractor and 24 bolts. The offence was alleged to have been committed at Newry, County Down, on the 16th June, 1944, and this summons was served personally on Edward Armstrong in Newry Courthouse on the 19th July, 1944.

On the 22nd July, 1944, the Prosecutor caused another summons to be issued against Edward Armstrong alleging that the said tractor was liable to forfeiture and condemnation under section 207 of the Customs Consolidation Act, 1876, and of sections 3 (1) and 3 (3) of the Import Export and Customs Powers (Defence) Act, 1939. This summons was served personally on Edward Armstrong in Newry R.U.C. Barracks on the 4th August, 1944.

The two summonses were heard at Newry Petty Sessions on the 9th August, 1944, Edward Armstrong was present and gave evidence, being represented by solicitor and counsel, and the Resident Magistrate dismissed both summonses on the merits.

From these orders the Prosecutor appealed to the County Court Judge of Down and the appeals were, ultimately, heard at the Hilary Sessions on the 16th January, 1945.

Proof was given that the Notices of Appeal were posted to Edward Armstrong on the 12th August, 1944,

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by registered postal packet properly addressed to him at his residence Nootka Lodge, Carlingford, County Louth. Under the provisions of section 24 (3) (*b*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 13)—which I shall refer to as the Act of 1935—notice in writing of the appeal had to be given to Edward Armstrong within seven days after the 9th August, 1944, while such notice of appeal might be "sent to "the person to whom it is to be given by post in a "registered letter addressed to that person at his last "or usual place of abode"—see section 24 (3) (*m*) of the Act of 1935. Afterwards on the 14th August copies of these Notices of Appeal were sent by registered post to Mr. Telford, Solicitor—who had represented Edward Armstrong before the Resident Magistrate—with a covering letter.

Before the learned County Court Judge, Mr. Hanna, counsel for Edward Armstrong, took the preliminary point that service by registered post of these notices of appeal was not good service on Edward Armstrong, who resided in Eire and to whose address in Eire the said notices had been directed. After argument, the County Court Judge acceded to this preliminary objection, and holding that "as the respondent resides "outside the jurisdiction of the Court the service of "the notice was not good service," declined to hear the appeals, and accordingly application was made by the Prosecutor for a Mandamus directed to the County Court Judge commanding him to enter continuances upon and to hear and determine these appeals.

Before us, Mr. Nicholson on behalf of the Prosecutor argued: (1) that the service by registered letter addressed to Edward Armstrong at his residence in Eire (County Louth) was good, and (2) that, in fact, there was "sufficient" service in this case.

As to this second argument, I am satisfied that we cannot give effect to it; whatever view might be taken as to the alleged service of the notices of appeal on Mr. Telford and the legal effect thereof, it is admitted that no evidence of this alleged service was given before

the County Court Judge nor was there any attempt made to prove that the Prosecutor had "done every-"thing in his power" (as Mr. Nicholson argued) to serve the notices on Edward Armstrong. The County Court Judge was asked to hold that the service by registered letter addressed to Edward Armstrong at Carlingford was good, and it is not surprising that no authority could be cited in support of the startling proposition that, having elected to rely solely on this service, the Prosecutor could now support his application for a mandamus by introducing evidence by affidavit to show that reliance could be placed on a wholly different form of service. In my opinion the Prosecutor cannot ask us to thus enable him to "mend "his hand" and on the present application to make a case which was never presented to the County Court Judge.

I therefore proceed to consider the validity of the only form of service evidence as to which was given before the County Court Judge. It is argued that a notice of appeal is not "process," that no conflict of jurisdiction is involved in giving notice to a person resident outside the jurisdiction, that an appeal has been taken from the decision of a Magistrate in a case arising out of an offence alleged to have been committed by this person within the jurisdiction, that the foundation of jurisdiction is the fact that a Magistrate has made an order and that the appeal is in reality only a further step in proceedings already commenced.

It is also argued that under the provisions of section 26 of the Interpretation Act, 1889, the service of these notices of appeal (having been sent in a letter properly addressed, prepaid and posted) is deemed "to have "been effected at the time at which the letter would "be delivered in the ordinary course of post" and that the letter having been posted on the 12th August, service must be deemed to have been effected before the 16th August. No evidence was given as to the "ordinary course of post" between Northern Ireland and Eire or in Eire, and it was argued that judicial notice could and should be taken of this. Judicial notice must be taken of the fact that in August, 1944,

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our country was engaged in war with Germany and Japan, that Eire had declared her neutrality in this war, and that an endeavour was being made to prevent the leakage of information which would be of assistance to our enemies from Great Britain and Northern Ireland into Eire, and this would render it tolerably certain that the course of post between Northern Ireland and Eire in war time would not be the same as the ordinary course of post between these countries in peace time.

In addition to this, however, we were not referred to any authority for the proposition that judicial notice will be taken of the ordinary course of post, and cases which I have examined under 13 & 14 Vict. c. 69, sec. 113 (Parliamentary Voters Ireland, 1850) appear to me to negative any such proposition. This section provides for the giving of notices of objection by registered post and it is provided that the production "of "such stamped duplicate shall be evidence of the "notice having been given to the person at the place "mentioned in such duplicate on the day on which "such notice would *in the ordinary course of post* have "been delivered to such place." In one of the cases decided on this section, *Hudson v. Louth* (1), Fitzgibbon L.J.at p. 80 says : "The stamped duplicate could not "prove the ordinary course of post from one place to "another and therefore this must be established by "other evidence, but the amount of such evidence to "be required and the extent to which presumptive "evidence may be relied on must vary in different "cases." In another case, *Doogan v. Colquhoun* (2), under the same statute, Palles L.C.B. at p. 367 says : "What that ordinary course of post is, is a matter of "fact that in every case must be proved," and Fitzgibbon L.J. at p. 373 says : "At the same time I "am equally of opinion that whenever an objector "takes advantage of the postal service he does so at "the cost of undertaking to give evidence of the time "required for this 'ordinary course of post.'" *Lewis v. Evans* (3), under a similar statute (6 Vict. c. 18,

(1) (1879) 6 L.R.Ir. 69.
(2) (1886) 20 L.R.Ir. 361.
(3) (1874) L.R. 10 C.P. 297.

sec. 100) also shows the necessity for evidence as to the "ordinary course of post" and in *Childs v. Cox* (1) (again, a decision under 6 Vict. c. 18, sec. 100, which was overruled in *Kemp v. Wanklyn* (2)) Baron Pollock observed during the argument that: "It cannot be "assumed that in every case there is an 'ordinary "'course of post.'" I am therefore of opinion that in the absence of any evidence as to the ordinary course of post there was no proof that the notice of appeal had been given to Edward Armstrong as required by section 24 (3) (*c*) of the Act of 1935 and that on this ground the present application should be refused.

While my opinion on this question renders it unnecessary for me to determine the validity of a notice of appeal under section 24 of the Act of 1935 when given by registered letter addressed to a respondent at his residence outside the jurisdiction, I think it right to express very briefly the opinion I have formed on this question out of deference to the arguments which have been addressed to us. I think that such a notice of appeal is not process and that it amounts to notice that a further step will be taken in proceedings already commenced within the jurisdiction. This is "an "instance of the branch of cases where the Court has "jurisdiction over the person, over the thing, over the "subject matter" (*vide* Bowen L.J., in *In re King & Co.'s Trade Mark* (3)). *Reg. v. Middlesex Justices* (4), was a decision that a notice of appeal against an affiliation order came within the meaning of "process" in the Sunday Observance Act, 1677, section 6, and this was approved of in *Milch v. Frankau & Co.* (5), but in *Whitney's case* (6), it was held that a notice requiring a citizen of the United States (who was resident in the U.S.) to make a return for the purposes of super-tax could be validly served on him by registered post, while *In re Cliff, Edwards v. Brown* (7), illustrates certain classes of "notices in the way of "information" which may be sent without any order

(1) (1887) 4 T.L.R. 114.
(2) [1894] 1 Q.B. 583.
(3) [1892] 2 Ch. 462 at p. 486.
(4) (1848) 17 L.J.(M.C.) 111.
(5) [1909] 2 K.B. 100.
(6) [1926] A.C. 37.
(7) [1895] 2 Ch. 21.

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of the Court to a person outside the jurisdiction. In my opinion when a Magistrate in Northern Ireland has before him a person who is resident in Eire and makes an order at the suit of this person or against him, notice of an appeal against such an order can be validly given under section 24 of the Act of 1935 by enclosing it in a registered letter addressed to that person at his residence in Eire.

Black J.

Black J.: In this case the Prosecutor sought to prove service on the respondent Edward Armstrong of the Notices of Appeal by relying on section 24 (3) (*m*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, which provides that such notices may be sent to the person to whom they are to be given by post in a registered letter addressed to that person at his last or usual place of abode.

Section 26 of the Interpretation Act, 1889, enacts that where an Act passed after the commencement of that Act (1st January, 1890) authorises any document to be served by post, whether the expression "serve" or the expression "give" or "send" or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Under s. 24 (3) (*b*) of the Act of 1935 the Prosecutor had seven days within which to serve the notices of appeal after the date upon which the summonses were dismissed by the Resident Magistrate.

Two objections are made to the Prosecutor's contention that the notices of appeal were validly and effectively served. The notices of appeal were posted to the defendant addressed to his home in Eire and it is contended in the first place that section 24 (3) (*m*) of the Act of 1935 does not authorise the service of notices of appeal outside Northern Ireland. And in the second place the point is made that even if a notice of appeal can be validly served out of the jurisdiction

under the provisions of section 24 (3) (*m*), yet it was further necessary for the Prosecutor to adduce evidence that the notices of appeal would have been delivered to the respondent in the ordinary course of post, before the expiration of the seven days after the decision of the Resident Magistrate prescribed by section 24 (3) (*b*). It is admitted that no evidence upon this point was tendered to the learned County Court Judge.

I shall deal with the first of these two points later. With regard to the second point, I do not think that the County Court Judge would have been entitled to assume without evidence that a registered letter posted in Newry in Northern Ireland on the 12th August, 1944, would have been delivered in the ordinary course of post to an addressee at Carlingford in Eire before the expiration of seven days from the Resident Magistrate's decision on the 9th August, 1944. As Lord Justice Murphy has pointed out, the war conditions existing in August, 1944, and the endeavours that were being made to prevent the leakage of information from Northern Ireland into Eire would render it tolerably certain that the course of post between Northern Ireland and Eire in August, 1944, would not be the same as the ordinary course of post between these countries in peace time.

Moreover, the decision of the Irish Court of Appeal in the case of *Doogan v. Colquhoun* (1), to which Lord Justice Murphy has referred in his judgment, establishes conclusively that what is the ordinary course of post in any particular case is a question of fact, a matter which must be established by evidence, and that a person who seeks to take advantage of a provision such as that contained in section 24 (3) (*m*) of the Act of 1935 does so, as Fitzgibbon L.J. says, at the cost of undertaking to give evidence of the time required for this "ordinary course of post." That is, as Fitzgibbon L.J. goes on to say, he must show by evidence, probable or demonstrative, that in such ordinary course his notice, posted when and where it was posted, *would* reach its destination within the time prescribed by the statute.

(1) (1886) 20 L.R.Ir. 361.

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Accordingly, as no evidence whatever was given by the Prosecutor before the County Court Judge to show what the ordinary course of post was between Newry and Carlingford, I am of opinion that he fell short of proving sufficiently the service of the notices of appeal within the time prescribed by section 24 (3) (*b*) of the Act of 1935, even if such notices can be validly served outside Northern Ireland. This is sufficient to determine the present application against the Prosecutor, but in view of the general importance of the other matters which were discussed before us, I think it right to indicate shortly my views in regard to them.

It is, of course, trite law that in the absence of special statutory enactment the Courts of a country are not entitled to exercise jurisdiction over a person outside the territorial limits of that country, unless such person has been served with the process of those Courts within those territorial limits (*Berkley v. Thompson* (1), *In re Busfield* (2), *In re La Compagnie Generale d' Eaux Minerales* (3), *In re King & Co.'s Trade Mark* (4)). In the present case both the summonses were served upon the respondent in Northern Ireland and there can be no doubt that such service was effective to subject the respondent to the jurisdiction of the Resident Magistrate. The question then arises whether this initial service of process was sufficient not only to subject the respondent to the jurisdiction of the Resident Magistrate but also to render him subject to such proceedings as might be taken in the Courts of Northern Ireland on appeal from the Resident Magistrate, even if the respondent had withdrawn himself from Northern Ireland before the proceedings on appeal had been set in train. I think this question of the *jurisdiction* of the appellate Courts is concluded by such cases as *Clarke v. McGuire* (5), and *Wills v. McSherry* (6). These were both cases in which a party to a proceeding before justices had required the justices to state a case under

(1) (1884) 10 App. Cas. 45.
(2) (1886) 32 Ch.D. 123.
(3) [1891] 3 Ch. 451.
(4) [1892] 2 Ch. 462.
(5) [1909] 2 I.R. 681.
(6) [1913] 1 K.B. 20.

the provisions of section 2 of the Summary Jurisdiction Act, 1857. This section provides that the party applying for the Case Stated must, within three days after receiving the Case Stated, transmit the same to the High Court "*first giving notice in writing of such* "*appeal*, with a copy of the case so stated and signed, "*to the other party to the proceeding in which the* "*determination was given*, hereinafter called 'the "'respondent.'" In both *Clarke v. McGuire* (1) and *Wills v. McSherry* (2) the intended respondents had disappeared from the country before the notices of appeal under section 2 of the Act of 1857 could be served on them, and there is no special statutory provision enabling such notices to be served out of the jurisdiction or prescribing that such respondents though outside the territorial jurisdiction could be made subject to the jurisdiction or process of the appellate Court. Nevertheless the Irish King's Bench Division in *Clarke v. McGuire* (1) and the English King's Bench Division in *Wills v. McSherry* (2) proceeded to hear the Cases Stated and did not suggest that their jurisdiction to do so was taken away by the fact that the respondents were not within the territorial jurisdiction at the time when the proceedings before the High Court were launched. They obviously considered that the fact that the respondents had been unquestionably subject to the jurisdiction of the justices was sufficient to continue them subject to the jurisdiction of an appellate Court to which the case might be carried on appeal from the justices in due course of law. In other words, once a person is effectually made subject to the jurisdiction of a Court by the service of what Bowen L.J. in *Re King & Co.'s Trade Mark* (3), at p. 483 calls the *initial* process, which is to found the jurisdiction of the Court, I think he remains subject to the jurisdiction of any Court to which the case against him can be brought on appeal, notwithstanding (*a*) that he withdraws himself in the meantime outside the territorial jurisdiction of those Courts and (*b*) that there is no statutory or other

(1) [1909] 2 I.R. 681.
(2) [1913] 1 K.B. 20.
(3) [1892] 2 Ch. 462.

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provision enabling the notice of appeal to the appellate Court to be served out of the jurisdiction.

Accordingly I am of opinion that the mere fact that Armstrong was outside the territorial jurisdiction from the time of the decision of the Resident Magistrate until after the time expired for the service of the notice of appeal (if such indeed was the case) would not deprive the County Court Judge of *jurisdiction* to hear the appeal.

But if the County Court Judge has *jurisdiction* to hear an appeal under section 24 of the Act of 1935, even though the respondent is out of the territorial jurisdiction, the question then arises how is this jurisdiction to be invoked.

Section 24 (3) (*b*) of the Act provides (*inter alia*) that the appellant shall give to the other party notice in writing of his appeal. Personal service of this notice of appeal is not necessary (*R. v. Somersetshire JJ.* (1)) and by section 24 (3) (*m*), it may be given by registered post. Can such a notice of appeal be served out of the jurisdiction ? It is argued that such notice is a mere notice—analogous to such notices as those considered in *Re King & Co.'s Trade Mark* (2), and *Whitney* v. *Inland Revenue Commissioners* (3)—and not in the nature of legal process and that, accordingly, it could be effectually served outside the territorial jurisdiction of Northern Ireland without any special statutory authorisation. In the case, however, of *Reg. v. Middlesex JJ.* (4), (cited with approval by Walton J. in *Milch v. Frankau & Co.* (5)) it was held that a similar notice of appeal to Quarter Sessions was in the nature of process. Erle J. said : " I am also of opinion " that the notice of appeal would come within the " meaning of the word ' process ' in the Statute of " Charles. It is a notice of what one Court has " decided, and it authorises another Court to take " further proceedings. It is, therefore, in the nature " of process." If then such a notice of appeal is not a mere notice but is in the nature of process, I think it

(1) (1900) 69 L.J.(Q.B.) 311.
(2) [1892] 2 Ch. 462.
(3) [1926] A.C. 37.
(4) (1848) 17 L.J.(M.C.) 111.
(5) [1900] 2 K.B. 100.

inevitably follows that a Statute of the Legislature of Northern Ireland cannot be read as authorising its service outside the territorial limits of Northern Ireland.

Is then the possibility of an appeal under section 24 of the Act of 1935 defeated by the intended respondent adopting the simple expedient of withdrawing himself over the Border into Eire until the time for service of the notice of appeal has expired? I think not. I refer again to the cases of *Clarke v. McGuire* (1), and *Wills v. McSherry* (2), which I have already mentioned. In each of these cases the Court proceeded to hear and deal with a Case Stated by Justices under section 2 of the Act of 1857, although no notice of appeal under the section had been given to the respondents, the facts being that it had become impossible to serve the respondents with the notices of appeal owing to the respondents having disappeared out of the jurisdiction, and that the appellants had done everything in their power to secure that the appeals should be brought to the respondents' knowledge. In *Wills v. McSherry* (2), the intended respondents had been complainants in the proceedings before the justices and in *Clarke v. McGuire* (1) the intended respondent had been the defendant before the justices. On the basis of these cases I would, as at present advised, be prepared to hold the County Court Judge entitled to hear an appeal to Quarter Sessions under section 24 of the Act of 1935 if the appellant established (*a*) that it was impossible to serve the notice of appeal upon the respondent under section 24 (3) (*b*) by reason of the absence of the respondent himself out of the territorial jurisdiction of Northern Ireland and (*b*) that the appellant had done everything that reasonably could be done to secure that the appeal should be brought to the respondent's knowledge within the time prescribed by section 24 (3) (*b*). In regard to this latter point it might in many cases be of importance to know whether an intimation of the bringing of the appeal had been sent by post to the respondent's address. Though such an intimation might not be effective

(1) [1909] 2 I.R. 681. (2) [1913] 1 K.B. 20.

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service of process on the respondent if the respondent's address was outside the territorial jurisdiction, yet the sending of such an intimation would clearly be a relevant fact in considering whether the appellant had done everything he could to bring the appeal to the respondent's knowledge. In *Re La Compagnie Generale d'Eaux Minerales* (1) though Stirling J. set aside the *service* of the notice of motion as being an unauthorised service of process out of the jurisdiction, yet he directed (p. 458) that a copy of the notice of motion should be sent to the foreign company with an intimation that it was sent in order that they might be informed that proceedings were pending which might affect their interests. Again a prudent appellant would probably also serve the notice of appeal upon the solicitor who had appeared for the respondent before the Resident Magistrate. No doubt in an ordinary case service of a notice of appeal under section 24 upon the solicitor who had appeared for the respondent before the Resident Magistrate will not be held to be good service unless the solicitor is still acting for the respondent in the matter (*R. v. Oxfordshire JJ.* (2), *R. (Hamilton) v. Leitrim JJ.* (3).) But both in *Clarke v. McGuire* (4), and *Wills v. McSherry* (5), the precaution was taken of serving the notice of appeal upon the solicitors who had represented the respondents before the justices.

In the present case the prosecutor sought to establish in this Court by affidavit evidence that he had served the notices of appeal upon the solicitor who appeared for the respondent at the hearing before the Resident Magistrate. It is admitted, however, that no such evidence was tendered before the County Court Judge. The place for the Prosecutor to prove service of the notices of appeal was before the County Court Judge and I entirely agree with Lord Justice Murphy that the Prosecutor cannot be allowed to support his application for a mandamus directing the County Court Judge to hear and determine the case by seeking to establish by affidavit evidence in this Court a mode

(1) [1891] 3 Ch. 451.
(2) [1893] 2 Q.B. 149.
(3) [1900] 2 I.R. 397.
(4) [1909] 2 I.R. 681.
(5) [1913] 1 K.B. 20.

of service which was never mentioned or sought to be proved before the County Court Judge. Moreover, even from the affidavits filed on behalf of the Prosecutor in this Court it does not appear that it was clearly impossible to serve the notices of appeal upon Armstrong in Northern Ireland. Though his home is across the border in Eire one might infer from the fact that one summons was served on him in Newry on the 19th July, 1944, and that the other was served on him in Newry on the 4th August, 1944, that he was a man who was not infrequently in Northern Ireland. No doubt it might be suggested that after the dismissal of the summonses against him on the 9th August, he might be careful to keep out of the jurisdiction until the time for appeal had expired. Nevertheless there is nothing in the affidavits by way of evidence to show that he may not in fact have been frequently and openly in Northern Ireland during the seven days after the Resident Magistrate's decision so that the notices of appeal could readily have been served upon him personally.

Conditional order discharged.

Solicitor for the prosecutor: *Chief Crown Solicitor.*
Solicitors for Edward Armstrong: *Wray & Telford.*

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May 7.

DOHERTY, APPELLANT ; LOWANS, RESPONDENT (1).

Bastardy—Illegitimate Children (Affiliation Orders) Act, (Northern Ireland), 1924 (14 & 15 Geo. 5, cap. 27), secs. 3, 4—Order for payment of weekly sums—Commutation for lump sum—Subsequent application to vary the Affiliation Order by altering the amount payable thereunder.

After the weekly sums payable under an Affiliation Order made under the Illegitimate Children (Affiliation Orders) Act (Northern Ireland), 1924, have been commuted by the Court for a lump sum and that lump sum has been paid to the collecting officer, no order can be made under sec. 3, sub-sec. 4 of the Act varying the Affiliation Order by altering the amount of the sums payable thereunder.

CASE STATED by the Additional County Court Judge of County Antrim.

The facts are stated in the judgment of Babington L. J.

Patton K.C., and *Moody* for the appellant.

Gibson for the respondent.

BABINGTON L.J.

BABINGTON L.J. : From the point of view of the appellant the proceedings taken by her in this case against the respondent under the Illegitimate Children (Affiliation Orders) Act (Northern Ireland), 1924, have run a very unsatisfactory course.

The respondent was adjudged to be the putative father of her child and the Resident Magistrate awarded her 5*s.* 0*d.* a week for its maintenance and education under section 1 (i) (*c*) at a time when the infant was some five months old. That order was made on the 14th May, 1940, and on 6th January, 1942, the respondent appeared before the Resident Magistrate and asked to have the 5*s.* 0*d.* a week commuted.

(1) In the Court of Appeal before Babington and Murphy L.JJ. and Black J.

Before this application was disposed of the respondent issued another summons under section 3 (4) (*a*) praying to have the 5*s.* 0*d.* weekly payment reduced on the ground that he was unable to pay it.

On 3rd March, 1942, both summonses came on together and the Resident Magistrate reduced the payments of 5*s.* 0*d.* per week to 3*s.* 6*d.* per week, and made an order commuting the reduced weekly sums of 3*s.* 6*d.* per week for the capital sum of £60 under section 4.

The child in this case is a boy and the provision made for him by the Statute continued in force until he attained fifteen years of age, and therefore the redemption of the sum of 3*s.* 6*d.* per week at the sum of £60 was, in my view, entirely inadequate on a purely actuarial basis.

The right of the child and the putative father to have the weekly payments reviewed under section 3 (4) (*a*) are complementary and these payments may be increased or reduced upon further evidence being given as to the financial position of either party, and in estimating what sum should be allowed when commuting weekly payments the Court should take into account the possibility of these payments being varied subsequently, because it must be satisfied that the sum awarded is sufficient to afford to the child benefits at least equal to those which would be afforded by payment of the weekly sums as directed by section 4 (1) (*b*). It is therefore wrong to reduce the weekly payments on the basis that the putative father is temporarily unable to discharge them and then commute these payments without taking into account a possible change in the financial status of the father.

The Resident Magistrate is bound to speculate in assessing the value to be put upon the right to weekly payments over the whole period of payment. He must address himself to the problem as Cozens-Hardy M.R. says an arbitrator under the Workmen's Compensation Act, 1906, must approach the question of the redemption of weekly payments under clause 17 of the First Schedule to that Act: "In redeeming

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"under clause 17 he is bound to speculate. He must "not rest content with finding that the weekly payment "which has been continued for six months is at the "moment the proper one. He must start with the "assumption that the existing weekly payment is "proper; but he must go further, and ascertain as best "he can whether that payment is likely to be proper "during the rest of the man's life." *Calico Printers' Association Ltd. v. Higham* (1).

The facts proved in this case illustrate how necessary it is to take all possibilities into account when calculating what capital sum will secure the child benefits equal to those afforded by the weekly payments which during the whole period of payment may be 20*s.* 0*d.* a week under section 1 (i) (*c*), for the County Court Judge finds that if it were open to him to review the weekly payments he would have increased them to 12*s.* 0*d.* a week.

No effective appeal was taken from the order commuting the 3*s.* 6*d.* a week but the appellant when she realized her position applied to review these payments under section 3 (4) (*a*), and this application was dismissed on the ground that she was bound by the commutation order and that there were no weekly payments which could be reviewed.

From this dismiss she appealed to the County Court Judge, who has stated this case for our opinion as to whether or not the commutation order is final.

In my opinion the commutation order is a bar to all further proceedings.

It was open to challenge, and appeals were lodged against the order reducing the weekly payments and against the commutation order but they never came to hearing, and the respondent is now trying indirectly to secure the relief that she could have obtained directly if she had been more fully alive to her rights when the commutation order was made. This course is not open to her. She has allowed the commutation order to be made without challenge, and the weekly payments having now merged in the lump sum awarded by the Resident Magistrate, they are no longer payable

(1) [1912] 1 K.B. 93, 97.

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and cannot be reviewed or altered under section 3 (4) (*a*).

Under section 5 an agreement between the mother and putative father for payment of a lump sum in discharge of liability is clearly a bar to further proceedings if the necessary conditions are fulfilled, and in my opinion a compulsory commutation under order of the Court has the same effect.

This appeal must therefore be dismissed.

MURPHY L.J.

MURPHY L.J.: I agree.

The question submitted to us was as follows:—

> "The question for the opinion of the Court is "whether the Order of 3rd March, 1942, com- "muting the weekly sums followed by payment "by the respondent to the Clerk of Petty Sessions "of the sum of £60 prevents the appellant from "obtaining under section 3 (4) of the Illegitimate "Children (Affiliation Orders) Act (Northern "Ireland), 1924, an order to have the weekly "sums varied."

On 3rd March, 1942, two summonses came up for hearing before Mr. Mark R.M. He heard the summons for reduction of the weekly sums first, and after hearing evidence that the respondent had been ill and out of work for a period, reduced the sum of 5*s.* 0*d.* per week to 3*s.* 6*d.* per week. He then heard the summons asking for the commutation of the weekly sums and ordered that the weekly sum of 3*s.* 6*d.* be commuted for the sum of £60, and that the sum of £60 be paid to the Clerk of Petty Sessions at Carrickfergus.

I am not to be taken as approving of the sum fixed by the Resident Magistrate as the amount of commutation. I do not know how he arrived at it and I think that the sum was quite insufficient. This, however, does not affect the question argued before us. The order could have been challenged and, in fact, steps were taken to challenge it, but these, unfortunately, failed.

Under section 4 of the Illegitimate Children (Affiliation Orders) Act (Northern Ireland), 1924, what has to be commuted is "any weekly sums payable under an

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"affiliation order" and I agree with Mr. Gibson that "payable" should be construed as "liable to be paid "from time to time." "Commutation" has in law the same effect as if the word "redemption" had been used.

Under section 4 before commutation could take place the Court had to be satisfied: (*a*) that arrangements had been made for the proper administration of the lump sum for the maintenance and education of the child; and (*b*) that the lump sum was sufficient to afford to the child benefits at least equal to those which would be afforded by the payment of weekly sums. I am of opinion that these words require the Resident Magistrate to speculate and that he is not to be confined to the actual weekly sum payable when the commutation order is made.

The case of the *Calico Printers' Association Ltd. v. Higham* (1), was cited to us by Mr. Gibson in the course of his argument. In that case Cozens-Hardy M.R. said at page 97: "In reviewing a weekly payment "under clause 16 the arbitrator must deal only with "existing facts, and must not prophesy or speculate "as to the workman's future condition. But in "redeeming under clause 17 he is bound to speculate. "He must not rest content with finding that the "weekly payment which has been continued for six "months is at the moment the proper sum. He "must start with the assumption that the existing "weekly payment is proper; but he must go further, "and ascertain as best he can whether that payment "is likely to be proper during the rest of the man's "life."

The object of an application for commutation under section 4 is to obtain finality, and I agree that the provisions of section 5 support the view that when a Commutation Order has been made and the sum so fixed has been duly paid, this is a complete bar to any subsequent application under section 3 (4).

BLACK J.

BLACK J.: The question to be decided in this case is what was the effect of the commutation effected by

(1) [1912] 1 K.B. 93.

the second Order of 3rd March, 1942, which purported to be made under the provisions of section 4 of the Illegitimate Children (Affiliation Orders) Act (Northern Ireland), 1924. The learned County Court Judge, affirming the decision of Mr. Mills R.M., held that this Order effected a commutation of all weekly sums which the respondent might at any time be liable to pay under the provisions of the Act in respect of the maintenance and support of the child of which he had been adjudged to be the putative father, so that upon payment by the respondent of the £60 fixed by the Order, the whole of his liability under the Act to pay weekly sums was definitely and finally brought to an end. The appellant on the other hand contends that the commutation was a commutation only of the weekly sum of 3*s.* 6*d.* a week, the amount to which the weekly sum which the respondent had been ordered to pay had been reduced by the first Order of 3rd March, 1942, under the provisions of section 3 (4) of the Act. The appellant accordingly asks the Court to hold that inasmuch as she can establish that the respondent's means have increased she is now entitled, notwithstanding the payment of the £60, to bring an application under section 3 (4) for a further weekly payment in excess of the 3*s.* 6*d.* a week which she contends was all that was commuted.

The question depends entirely upon the provisions in regard to commutation of weekly payments contained in section 4. I agree with the Lords Justices that the construction of that section contended for by the respondent is the proper construction of the section and that a commutation effected under the provisions of section 4 is a commutation of all weekly sums which a putative father may be liable to pay under the Act.

Section 1 of the Act, which confers the power to make Affiliation Orders, enacts that an Affiliation Order may provide for the payment by the putative father of a weekly sum of money in respect of the maintenance and education of the child. Note that the section uses the phrase weekly sum (singular), not weekly sums (plural). The conception here is of a definite fixed sum to be specified in the Affiliation

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Order and to be paid weekly by the putative father.

Section 3 (2) of the Act directs that any weekly sum (again using the singular number) payable under an Affiliation Order shall be calculated from such date, within certain limits, as the Court thinks fit.

Section 3 (4) then provides that a Court of summary jurisdiction may, upon cause being shown upon fresh evidence, make an Order varying an Affiliation Order by altering the amount of the sums payable thereunder. This sub-section introduces the possibility of different weekly sums being payable in respect of the same child at different periods. Of course only one weekly sum (singular) will be payable during the subsistence of any particular Order. But under the sub-section varying weekly sums may from time to time become payable in respect of the same child under Orders made in exercise of the jurisdiction conferred by the sub-section. I think that when subsequent sections of the Act use the phrase weekly sums (plural) that phrase is intended to be a comprehensive one and to include all such different weekly sums as may be payable whether under the original Affiliation Order or on foot of subsequent Orders made under section 3 (4).

Section 4 provides for the commutation of weekly sums. It enacts that any weekly sums (plural) payable under an Affiliation Order may be commuted by the Court for a lump sum on the application of the putative father. I am satisfied that the use in this provision of the plural, weekly sums, means that the subject matter of the commutation is to be the varying weekly sums which may from time to time become payable in respect of the child and not merely the particular weekly sum (singular) which may chance at the time of the commutation to be payable either under the original Affiliation Order or under a subsequent Order varying it. This view appears to me to be borne out by the provision in section 4 (1) that the Court is to be satisfied that the lump sum is sufficient to afford the child benefits at least equal to those which would be afforded by the payment of weekly sums (again plural). Here again I think that the plural, weekly sums, is clearly intended to include all

weekly sums of whatever varying amounts which may at any time be payable. I think "the payment of "weekly sums" is a phrase apt to describe in the most general way the putative father's whole liability under the Act to make weekly contributions in respect of the maintenance and education of the child. I feel sure that the provision would have been worded very differently if the Legislature had intended that the lump sum payable upon a commutation under the section should, as it were, effect a redemption merely of the particular weekly sum payable at the time of the commutation and would accordingly merely have to be sufficient to afford benefits at least equal to those which would be afforded by the payment of that particular weekly sum (singular).

Inasmuch then as I am of opinion that the commutation to be effected under section 4 is to be a commutation of the putative father's whole liability to pay weekly sums, the amount of which may be varied under the provisions of section 3 (4), I entirely agree that the Resident Magistrate, in considering what amount would be sufficient to afford to the child benefits at least equal to those which would be afforded by the payment of weekly sums, must not have regard only to the particular weekly sum payable at the time of the commutation but must speculate as best he can as to future probabilities. In particular he must give full weight to the possibility of the weekly sum being increased in future by an Order under section 3 (4).

As the Lords Justices have pointed out, this view that the intention of the Legislature was that a commutation under section 4 should definitely bring to an end the whole of the putative father's liability under the Act to pay weekly sums finds strong confirmation in the reference to the commutation of weekly sums contained in section 5. Section 5 provides that an agreement for the payment of a lump sum is to be a bar to proceedings under the Act if the Resident Magistrate is satisfied that the agreement affords the child benefits at least equal to those which might have been obtained by the commutation of weekly sums

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payable under an Affiliation Order. In so fixing the benefits which might have been obtained by a commutation of weekly sums under section 4 as a standard to measure the adequacy of an agreed lump sum designed to redeem completely all liability under the Act to pay weekly sums, it seems reasonably clear that the Legislature considered that a commutation under the provisions of section 4 was also a transaction which would completely cover and redeem all liability under the Act to pay weekly sums.

Appeal dismissed.

Solicitors for the appellant : *William Harper & Sons.*
Solicitor for the respondent : *Skelton, McMaster & Co.*

J. McC.

EMERSON v. HEARTY AND MORGAN. (1)

C.A. 1945.

May 1, 16.

Case Stated—Principles to be observed when drafting.

A Case Stated should be in paragraphs setting out the facts of the case, the contentions of the parties and the Trial Judge's findings of fact and any inferences or conclusions of fact which he drew from the facts found by him.

CASE STATED by the County Court Judge of County Armagh.

Nicholson K.C. and *Hanna* for the complainant and appellant.
McVeigh and *Conaghan* for the defendants and respondents.

In this case, the decision of the Resident Magistrate who had convicted the respondents of offences under the Customs Laws was reversed by the County Court Judge who held that the facts proved did not discharge the onus which lay on the complainant to establish a prima facie case. The complainant asked for a Case Stated.
During the hearing of the Case Stated the following judgment of the Court on a preliminary point was delivered by Murphy L.J.

MURPHY L.J. : When this Case was opened before us it became apparent that the form in which the Case was stated gave rise to difficulties. Though the Case sets out at length certain evidence given at the hearing it does not set out what precise facts were found by the County Court Judge. In order to deal with a question of law sought to be raised by a Case Stated this Court must have clearly before it (*a*) the precise facts found by the Judge who stated the Case and (*b*) any inferences or conclusions of fact which he drew from the facts MURPHY L.J.

(1) In the Court of Appeal before Babington and Murphy L.JJ. and Black J.

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found by him. We accordingly propose to send the Case back to the learned County Court Judge for amendment and, if necessary, for restatement. And as regards the question of law intended to be raised by the Case it would seem possible that this also may require reconsideration and restatement. It would appear strange that a Case should be stated merely for the purpose of raising the point of law already settled by the decision of this Court in *Emerson v. Woods* (1), a decision which, as appears from the Case Stated, was referred to at the hearing.

We have thought that this may be a convenient opportunity to call attention to the principles which ought to be observed in drafting Cases Stated.

The Case should be stated in consecutively numbered paragraphs, each paragraph being confined, as far as possible, to a separate portion of the subject matter. After the paragraphs setting out the facts of the Case there should follow separate paragraphs setting out the contentions of the parties and the findings of the Judge.

The Case should set out clearly the Judge's findings of fact, and should also set out any inferences or conclusions of fact which he drew from those findings. The task of finding the facts and of drawing the proper inferences and conclusions of fact from the facts so found is the task of the Judge. It does not fall within the province of this Court. Accordingly, it is not legitimate by setting out the evidence in the Case Stated and omitting any findings of fact to attempt to pass the task of finding the facts on to the Court of Appeal. What is required in the Case Stated is a finding by the Judge of the facts, and not a recital of the evidence. Except for the purpose of elucidating the findings of fact it will rarely be necessary to set out any evidence in the Case Stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the Judge which would justify him in deciding as he did.

The point of law upon which this Court's decision is

(1) [1942] N.I. 118.

sought should of course be set out clearly in the Case. But we think the Judge is certainly entitled to expect the party applying for the Case Stated to indicate the precise point of law upon which he wishes to have the decision of the appellate Court. It would be convenient practice that this should ordinarily be done in the written application for the Case Stated. We gather that in the present case the Judge had not the assistance of any statement from the applicant for the Case Stated as to the exact point of law which he wished to have raised in the Case.

Case remitted to County Court Judge for amendment.

Solicitor for the complainant : *Chief Crown Solicitor.*
Solicitor for the defendants : *J. G. Lennon.*

M. V. P.

K.B.D. 1945.

ROBINSON v. CHAMBERS (1).

Mar. 9.

Practice—Order for interrogatories—Issue joined—Whether affidavit necessary—Order XXXI, r. 1.

Where a plaintiff applies *ex parte* after issue joined for liberty to administer interrogatories it is not necessary that the application should be grounded on affidavit,

Rowlands v. Hooper (1892) 26 I.L.T.R. 131, and *Hannan v. Plunkett* (1892) 26 I.L.T. 304 not followed.

APPLICATION *ex parte* by the plaintiff for liberty to administer interrogatories to the defendant after issue joined.

The plaintiff brought an action for damages for libel and slander. The defendant was the Rector of the Parish of Glenavy and the plaintiff was a member of his congregation and a Diocesan Synodsman for the Parish. The plaintiff alleged that the defendant falsely and maliciously wrote and published of and concerning the plaintiff in a letter intended to be addressed to the Secretary of the Diocesan Council of Down and Connor and Dromore, to various persons present at the Easter Vestry Meeting of the Parish of Glenavy, held on 14th April, 1944, the following words : " Making collections in the name of the Parish, " without reference to the Vestry, and giving no " account of the same." The pleadings had been closed by joinder of issue on 24th January, 1945. An application was then made on behalf of the plaintiff without affidavit for an order for liberty to administer interrogatories.

Gibson for the plaintiff in support of the application : The difficulty in my way is that it is stated in " Wylie's " Judicature Acts," 2nd ed., at p. 474, that after issue joined the application should be on affidavit. In support of this statement two cases are cited as authorities, *Rowlands v. Hooper* (2) and *Hannan v. Plunkett* (3).

(1) In the King's Bench Division before MacDermott J.

(2) (1892) 26 I.L.T.R. 131. (3) (1892) 26 I.L.T. 304.

I submit that these cases do not establish the practice as stated in Wylie. There were special circumstances in *Rowlands v. Hooper* (1), in that there had been considerable delay. The reference to *Hannan v. Plunkett* (2) in the *Irish Law Times* is only in the form of a note in the miscellaneous portion of that journal and it is impossible to say that it establishes any principle.

MACDERMOTT J. granted the application.

Solicitor for the plaintiff : *Wilfred S. Park.*

J. McC.

(1) (1892) 26 I.L.T.R. 131. (2) (1892) 26 I.L.T. 304.

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GOODWIN AND ANOTHER v. LECKEY AND ANOTHER (1).

Nov. 9, 12, 13; Dec. 7.

Insurance—Motor car—Third-party liability—Policy, by endorsement, limited to insured and two named drivers—Driver not named in policy—Road accident—Judgments against owner and driver—Claims by injured third-parties to be indemnified—Validity of endorsement—Scope of insurer's liability—Public policy—Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, (20 & 21 *Geo.* 5, *c.* 24), *Part II sections* 6-17—*Motor Vehicles and Road Traffic Act (Northern Ireland)*, 1934 (24 & 25 *Geo.* 5, *c.* 15), *sections* 15, 18, 20.

The owner of a taxi was insured under a policy which indemnified in respect of all sums which the insured or any person in his employ driving on his order or with his permission might be legally liable to pay in respect of bodily injury to any person. By a subsequent endorsement attached to the policy it was stated that " no " claim shall attach to this Policy in respect of any accident occur- " ring whilst the Insured Vehicle is being driven by or is for the " purpose of driving in charge of any person other than Insured " [and two named persons]." The plaintiffs were injured in a road accident by the negligence of the driver of the taxi. The driver was driving with the permission of and in the course of his employment by the insured, but he was not one of the two persons named in the endorsement on the policy. The plaintiffs having obtained judgments against the driver and the insured applied under section 18 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, for an order against the insurer to pay to the plaintiffs the sums payable under the judgments.

Held, that neither the insured nor the driver was covered by the policy in respect of the plaintiffs' injuries.

Meaning of the words " in respect of any liability which may be "incurred by the insured" in section 7 (1) (b) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, as amended by section 15 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, considered.

A policy of insurance complies with the requirements of section 7 (1) of the Act of 1930, as amended by section 15 of the Act of 1934, notwithstanding that it does not extend to give indemnity in respect of every person who may use the insured vehicle with the permission of the insured.

Sutch v. Burns [1943] 2 All E.R. 441 not followed.

APPLICATIONS by the plaintiffs under section 18 (1) of the Motor Vehicles and Road Traffic Act (Northern

(1) In the King's Bench Division before MacDermott J.

Ireland), 1934, for an order against the Eagle Star Insurance Co. Ltd. as insurers to pay to the plaintiffs the sums payable under judgments obtained against the defendants in actions for damages for personal injuries.

The facts are stated in the judgment.

Nicholson K.C. and *Conaghan* for the plaintiffs.

McSparran K.C. and *Harrison* for the defendants.

The arguments of counsel appear sufficiently in the judgment. In addition to the cases cited in the judgment the following cases were referred to : *Robertson and Thomson v. French* (1) ; *Kirkham v. Marter* (2) ; *Sarat Chunder Dey v. Gopal Chunder Lala* (3) ; *Morris v. Baron & Co.* (4) ; *Donald H. Scott & Co. v. Barclay's Bank Ltd.* (5) ; *Tsang Chuan v. Li Po Kwai* (6) ; *In re National Benefit Assurance Co. Ltd.* (7) ; *Freshwater v. Western Australian Assurance Co.* (8) ; *Greenlees v. Port of Manchester Insurance Co.* (9) ; *McCormick v. National Motor and Accident Insurance Union* (10) ; *Digby v. General Accident Fire and Life Assurance Corporation Ltd.* (11) ; *Austin v. Zurich General Accident and Liability Insurance Co. Ltd.* (12).

Cur. adv. vult.

MACDERMOTT J.

MACDERMOTT J. : On the 3rd October, 1943, the plaintiffs were run down and injured in a Belfast street by a taxi driven by the defendant Thomas Leckey with the permission of, and in the course of his employment by, the defendant James McCleery. The plaintiffs brought actions for damages in respect of their personal injuries. These were heard by me on the 3rd July, 1945, when each plaintiff succeeded in obtaining judgment against both defendants, Andrew Goodwin for

(1) (1803) 4 East. 130.
(2) (1819) 2 B. & Ald. 613.
(3) [1892] 8 T.L.R. 732.
(4) [1918] A.C. 1.
(5) [1923] 2 K.B. 1.
(6) [1932] A.C. 715.
(7) [1932] 2 Ch. 184.
(8) [1933] 1 K.B. 515.
(9) [1933] S.C. 383.
(10) (1934) 50 T.L.R. 528.
(11) [1943] A.C. 121.
(12) [1945] K.B. 250.

K.B.D. 1945.

GOODWIN AND ANOTHER v. LECKEY AND ANOTHER

MACDERMOTT J.

£550 and costs and Sarah Goodwin for £590 and costs. These judgments having yielded nothing the plaintiffs then brought the present applications on notice to the defendants and the Eagle Star Insurance Co. Ltd. (hereinafter referred to as "the company") for an order under Section 18 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, directing the Company, as insurers, to pay to the plaintiffs the amounts due on foot of their respective judgments.

At the time of the accident the defendant McCleery held a motor vehicle policy issued by the Company and numbered NOV 24534. The relevant facts and circumstances concerning this insurance may be stated as follows. McCleery was the third holder of the policy, the transfer to him being evidenced by endorsement No. 11 which is dated the 19th April, 1943. Endorsement No. 10, of the same date, substituted a description of the Austin car involved in the accident for that of the vehicle previously insured. Endorsement No. 12 is also dated the 19th April, 1943. Like the other endorsements it takes the form of a gummed slip stuck on to the policy. It reads :

"It is Hereby Declared and Agreed that from the "18th day of January, 1943, no claim shall attach "to this Policy in respect of any accident occurring "whilst the Insured Vehicle is being driven by or is "for the purpose of driving in charge of any person "other than Insured/J. Russell/J. Miskimmon. "Subject to the terms, conditions, exceptions and "limitations hereof."

This was not the first endorsement of the kind. Earlier slips had named drivers and had purported to limit the cover to accidents occurring whilst the insured vehicle was being driven by or was in charge of the persons so specified. Endorsement No. 12 contained but one new name as Russell and McCleery had been mentioned in some of the earlier endorsements, McCleery, as it seems, having then been employed as a driver by the previous proprietors. Endorsement No. 12 was issued by the Company in response to what the Company called a "supplementary proposal form" which was signed by McCleery on the 31st March,

1943. This form sets out the name, address, age, occupation and length of driving experience of the additional driver. Then follows a series of printed questions and written answers. Beneath these and immediately above McCleery's signature is a paragraph warranting the truth of the statements and particulars given and agreeing that "this Supplement" is to be taken as incorporated with the proposal for the insurance. The questions on this form are of a searching nature designed to test the capacity and reliability of the driver proposed. I need not detail them at length. They ask, *inter alia*, as to previous convictions, previous insurance, physical defects, eyesight, and previous accidents.

Apart from these endorsements the policy is of a type not unusual for contracts of the kind. Clause I deals with damage to or loss of the insured vehicle. Clause II indemnifies in respect of liability to third parties, the material wording being—"All sums which "the Insured or any person driving on the order or "with the permission of the Insured may be legally "liable to pay in respect of: . . . (b) . . . "bodily injury to any person . . ." Then come provisions relating to towage and no claim bonus. These are followed by four numbered paragraphs under the heading "General Exceptions" which, *inter alia*, and notwithstanding the wide terms of clause II, exclude liability where the insured vehicle is being driven by any person other than the insured or someone in his employ. The next heading is "Conditions." These are grouped in seven numbered paragraphs and are followed immediately by the testimonium. On the back of the document is a schedule containing particulars of the first policy holder, the premium and the vehicle. It also contains a stipulation that the vehicle "shall be used only for the conveyance of passengers "for hire or reward." After this is a printed "special "condition" relating to inexperienced drivers which is not now material. This concludes the document apart from some sixteen endorsements attached as already described.

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In its form and arrangement the policy leaves much to be desired. It is confusing and difficult to follow, and I venture to express the hope that instruments of this type, which are now of much importance to the public as well as to the parties, may soon lose their traditional obscurity and appear in simpler shape.

It is clear that this policy was issued by the Company as complying with the requirements of Part II of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, as amended by the Act of 1934. When McCleery became the policy holder the Company gave him a document purporting to be a certificate of insurance under Section 7 (4) of the Act of 1930, as amended by Section 15 of the Act of 1934. This certificate contains headings corresponding with those prescribed by Form A in the schedule to the Motor Cars (Third Party Risks) (Northern Ireland) Regulations, 1934 (1934 S.R. & O. No. 109). Below heading No. 5—" Persons or classes of persons entitled to " drive "—there is printed on the certificate :

" (*a*) The policy-holder.
" (*b*) any person in the employ of the Policy-holder
" driving on the order or with the permission
" of the Policy-holder."

This printing, which reflects accurately enough the relevant provisions of the policy considered apart from the endorsements, was not deleted in the certificate issued ; but in the spaces left in the printing there was typewritten—" Policy-holder or J. Russell or J. Mis-
" kimmon only entitled to drive." This was obviously an attempt to relate the information under heading No. 5 to endorsement No. 12. The Company explained that the certificate was issued without the deletion of the printed words which I have quoted by reason of a typographical error and I see no reason to doubt this explanation.

The claimants gave the Company due notice of the proceedings in which they obtained their judgments and the only matter arising for determination under Section 18 (1) of the Act of 1934 is whether those judgments against the owner and driver are, to use the language of the subsection, " for a sum in respect of the

"liability for which such owner or driver is insured by "a policy issued . . . for the purposes of Part II "of the Act of 1930" as amended by the Act of 1934. In other words, are the Company liable in respect of the judgments having regard to the terms of their contract and the provisions of the statutes ?

That the terms of the policy, considered apart from its restrictive endorsements, complied with the requirements of the Acts of 1930 and 1934 was not disputed save in one respect to which I refer later ; nor was it suggested that the Company could have avoided liability had the original terms of the policy remained unaltered. The Company's case throughout was that endorsement No. 12 was an effectual part of the contract and, consequently, that there was no cover for accidents occurring whilst Leckey was driving the insured vehicle.

The principal submission on behalf of the claimants was to the effect that endorsement No. 12 was a severable stipulation which should be rejected on the ground that it conflicted with the statutory requirements for a policy issued for the purposes of Part II of the Act of 1930 (1) and was contrary to public policy. The argument in support of this contention raised three points for consideration. I shall take them in turn.

(1) Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, sec. 6 (1):

"Subject to the provisions of this "Part of this Act, it shall not be "lawful for any person to use, or to "cause or permit any other person "to use, a motor car on a public "highway unless there is in force in "relation to the user of the motor "car by that person or that other "person, as the case may be, such "a policy of insurance . . . in "respect of third-party risks as "complies with the requirements of "this Part of this Act."

Sec. 7 (1) as amended by Sec. 15 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 :

"In order to comply with the re- "quirements of this Part of this "Act a policy of insurance must be "a policy which—

. . . . . .

(*b*) insures such person, persons or classes of persons as may be specified in the policy . . . in respect of any liability which may be incurred by the insured in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the motor car on a public highway ; and

(*c*) is not subject to any condition, restriction or limitation which is prescribed as a condition, restriction or limitation, as the case may be,

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The first contention advanced was that a policy complying with Part II of the Act of 1930 had to cover *anyone* driving with the insured's permission, that any stipulation to the contrary was invalid, and therefore that Leckey, who is not named in endorsement No. 12, was covered. It was said that Section 7 (1) (*b*) of the 1930 Act had to be read with Section 6 (1) and stress was laid on the words " or permit any other person to " use " in the latter subsection. I do not think this contention is sound. Section 7 (1) (*b*) requires cover in respect of " any liability " and permitting another to use the vehicle does not necessarily involve the owner in any liability, vicarious or otherwise. No doubt a policy complying with Section 7 (1) is the means of avoiding a contravention of Section 6 (1). But it does not follow that all cover which may be required by Section 6 (1) must be found in a single contract of insurance. It will suffice if the person permitted to

which shall not be inserted in a policy issued for the purposes of this Part of this Act ;

. . . . . "

Article 7 : Motor Cars (Third Party Risks) (Northern Ireland) Regulations, 1934 (1934 S.R. & O. No. 109) :

" There shall not be inserted in " any policy . . . issued . . . for " the purposes of the Act any condi- " tion, restriction or limitation as " the case may be with regard to " any of the following matters :—

(*a*) the age or physical or mental condition of persons driving the vehicle ; or

(*b*) the race, nationality, religion or occupation of persons driving the vehicle ; or

(*c*) the period of driving experience of persons driving the vehicle ; or

(*d*) the existence of any endorsement on the licence of the person driving the vehicle ;

. . . . . "

Sec. 20 of the Motor Vehicle and Road Traffic Act (Northern Ireland), 1934 :

" If, in any policy . . . issued for " the purposes of Part II of the Act " of 1930 . . . there is inserted any " condition, restriction or limitation " which is prescribed as a condition, " restriction or limitation, as the " case may be, which shall not be " inserted in such a policy . . . such " condition, restriction or limita- " tion shall be of no effect in con- " nection with such claims as are " mentioned in paragraph (*b*) of " subsection (1) of section seven of " the Act of 1930, as amended by " this Act :

" Provided that nothing in this " section shall be taken to render " void any provision in a policy . . . " requiring the person insured . . . " to repay to the insurer . . . any " sums which the latter may have " become liable to pay under the " policy . . . and which have been " applied to the satisfaction of the " claims of third parties."

use the vehicle is covered either by the owner's policy or by some other policy—it may be the user's—provided the operative policy complies with the Acts. The decision of Atkinson J. in *Sutch v. Burns* (1) was cited in support of the claimants' submission. This decision was reversed by the Court of Appeal (2) on the ground that the circumstances to which it related were hypothetical. It may therefore be said that the reasoning of the learned Judge has not been overruled and I have accordingly given it my careful consideration. As I read the reports Atkinson J. certainly came to a conclusion favourable to the claimants' contention on this point, for he decided that a policy purporting to cover the *liability* of the policy holder and to be issued in conformity with the requirements of the English Road Traffic Acts afforded cover in respect of injury to a third party due to the negligence of the insured's driver whilst driving with the insured's permission but outside the scope of his authority. I find myself, with great respect, unable to accept the grounds for this conclusion as stated in the reports and I prefer the view I have reached for the reason I have given. I need only add that, if the point be good, the policy in question is on its face bad, for (apart from the endorsements) the cover it purports to give is restricted to the insured and those in his employment and does not extend to *anyone* driving with permission though, on the argument, that would be necessary if the scope of a valid policy had to be co-extensive with all the terms of Section 6 (1).

The second point taken on behalf of the claimants goes deeper and is one of some difficulty. It was put like this. "The policy of the Legislature was ob- "viously to provide that those who suffer injury in "road accidents should get paid such compensation as "is due to them. To this end insurance against third- "party risks was made compulsory and Section 7 (1) "provided that any policy issued for the purpose of "the Acts must cover the insured in respect of *any* "liability incurred by him by reason of injury to any "person caused by the use of the vehicle on the public "highway. Here, the policy of insurance purports to

(1) (1943) 2 All E.R. 441. (2) [1944] K.B. 406.

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"comply with the statutory requirements and the "insured has incurred the very kind of liability en- "visaged by Section 7 (1). Apart from endorsement "No. 12 the policy covers that liability. With en- "dorsement No. 12 it does not. Accordingly the "endorsement must be left out of account." Now, that is an attractive proposition in the sense that, if sound, it reflects a simple, clearcut system whereby every car user must be insured by a statutory form of policy and every such policy must cover every third party risk. A system of that sort would, no doubt, confront insurers with a substantial problem which it is not for me to explore. Yet if Section 6 (1) and Section 7 (1) (*b*) stood alone there would be much to be said in favour of the proposition, whatever the difficulties involved. But taking the legislation as it stands, I think it is clear that the system of compulsory insurance which it creates is not of this absolute character. It is a system resting on contract between authorised insurers and those whom they choose to insure. It is a compromise between an absolute system and the state of affairs existing before the Legislature intervened. This is manifested by various provisions in the statutes which go to show that the words "insures . . . in "respect of any liability" in Section 7 (1) (*b*) cannot be read without qualification. For example, paragraph (*c*) of the same subsection which prohibits conditions, restrictions and limitations which may be prescribed certainly indicates that a policy may conform with the requirements of paragraph (*b*) and still be subject to some limitations and restrictions bearing on the cover it affords. And, again, the words "in force in relation "to the user of the motor car" which are contained in Section 6 (1) of the 1930 Act, when taken in conjunction with the words "arising out of the use of the "motor car" which occur in Section 7 (1) (*b*), certainly suggest that the cover required may lawfully be limited to a particular user—in the absence, of course, of any valid regulation to the contrary. Section 6 must necessarily be directed to the actual user at some particular time. The obligation is on the person using or authorising the use of the vehicle to see that the

actual user is covered. But this does not mean that the policy must cover every form of user and I do not think that Section 7 (1) (*b*) so requires. If it does "the use" should be read "any use," a construction which, so far as I am aware, has never been definitely accepted in any reported decision. On the contrary, there are several cases where a limitation as to user has been regarded as valid. See, for example, *Bright v. Ashfold* (1) and *Gray v. Blackmore* (2) (*per* Branson J. at p. 104 *et seq.*) And it may also be observed in this connection that the prescribed form of insurance certificate contemplates the possibility of such a limitation by requiring a statement concerning "limitations as to use."

But if it is clear that the words "in respect of any "liability" require some qualification, it is not quite so clear how far the qualification should go. The other extreme lies in the submission advanced on behalf of the Company which, as I understand it, came to this, that "in respect of any liability" means any liability which the parties may agree to cover without resort to prohibited stipulations.

I do not think that is sound either. If such had been the intention of the Legislature it is hard to believe that Section 7 (1) (*b*) would have been given its present form. The words are not apt to imply such a qualification and paragraph (*b*) would, indeed, be singularly futile if all it did was to require that a policy, in order to comply with the Act, must give such third-party cover as might be agreed. Further, the proviso to Section 7 (1) specifies certain kinds of *liability* which a policy "shall not be required to cover." I think that in itself renders this wide interpretation quite untenable; for the proviso indicates plainly enough that, but for it, "in respect of any liability" would make it compulsory to insure against the three types of liability it specifies, namely, liability (in certain cases) to employed persons, liability to certain passengers and contractual liability.

It seems to me that the key to the true construction of the words "in respect of any liability" lies in the

(1) [1932] 2 K.B. 153. (2) [1934] 1 K.B. 95.

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recognition of a distinction between the nature of the liability to be covered and the circumstances of the event from which the liability arises. The protection afforded to injured third parties by the Acts is based not only on the existence of insurance giving wide cover but on the performance by the person using or permitting the use of the vehicle of the statutory obligation imposed upon him by Section 6 (1) and enforceable by the penal provisions of Section 6 (2). He must do more than see that there is a policy covering "any liability." He must see that the policy is "in force," or effectual to give that cover, "in relation "to" the user of the vehicle which he makes or authorises. The policy of the Acts thus rests on two stools—the contract of insurance and the conduct of the insured. If either proves defective the injured third party may fall between the stools. But that is the system and the qualification which I think it gives the words "in respect of any liability" is not to reduce their scope beyond the express exceptions contained in the proviso to Section 7 (1), but to make the cover dependent upon the observance by the insured of any stipulations which the policy may lawfully impose as conditions precedent to liability on the part of the insurers. For example, if endorsement No. 12 had been to the effect that no claim should attach for liability in respect of any sum exceeding, say, £100, or in respect of injury to a certain class of persons, say, blind pedestrians, the result, as I read the Acts, would be a stipulation in the teeth of Section 7 (1) (*b*). But if, on the other hand, the endorsement merely provided that no claim should attach if the driver had never been licenced or if the accident occurred whilst the vehicle was being used for racing, then, if the principle I have endeavoured to propound is correct, Section 7 (1) (*b*) would not be contravened though a failure to observe the stipulation might enable the insurers to repudiate liability.

This being the position, does endorsement No. 12 infringe the statutory direction that the policy must give cover "in respect of any liability"? In my opinion it does not. It does not reduce the *scope* of

the liability covered. And (apart from the matters considered below in connection with the claimants' third point) in my view it does not, as a stipulation making liability contingent upon its observance, offend against the Acts or the nature of the system they establish. It may be that such a stipulation, if entirely unrelated to the conduct of the insured or dealing with matters quite outside his control, would so offend. But I need not decide that. This stipulation is, I think, on a par with a limitation as to user. Its observance is a matter under the control of the policy holder. As long as McCleery saw to it that only the drivers named drove the vehicle concerned the cover was good and in accordance with the statutory requirements. If the claimants have not got the protection afforded by the Acts it is due to the conduct of the insured and not to the policy falling short of what is required by Section 7 (1) (*b*).

But then it is said—and this brings me to the third point made on behalf of the claimants—that endorsement No. 12 ought to be rejected for another reason, namely, that it is invalid as being contrary to Article 7 of the Regulations of 1934 and against public policy. The argument on this stressed, not unnaturally, the merits as seen from the third party point of view. The Company, it was said, being unable to avoid liability by stipulations relating to most of the characteristics which serve to distinguish the unreliable driver, get the policy holder to give full particulars as to the driving qualifications of those who it is proposed should drive the insured vehicle, and then, if satisfied as to the qualifications of the persons named, limit the policy so as to afford cover only whilst some one of such drivers is driving or in charge of the vehicle.

Now, whether so intended or not, this process seems to go some way at least towards circumventing the restrictions imposed by Article 7 and in certain circumstances it might well produce anomalous results. But I am not satisfied that it is in breach of Article 7. The difference, in practice, between what is forbidden and what the Company have done may not be very wide, but I think it is sufficiently marked to save the

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endorsement. Article 7 strikes at provisions of the kind it specifies in general terms which are as applicable when the drivers covered are named as when they are not. If the Company choose to cover only those drivers about whose competence they are satisfied I cannot see that this exercise of their discretion contravenes the Article in question. And I entertain no doubt that a policy issued in conformity with the provisions of Section 7 (1) (*b*) may name all those whose liability is covered. Indeed paragraph (*b*) says so, for it provides that such a policy must insure "such per- "son, persons or classes of persons as may be specified "in the policy."

I think this last consideration also serves to answer the plea of public policy, for I find it hard to see why public policy should condemn a practice which the Acts allow and the Regulations do not prohibit.

My conclusion on this branch of the case then is that endorsement No. 12 must be treated as a valid term of the policy. Having reached this conclusion I should perhaps add that it occurred to me after the hearing that this endorsement might possibly, as a matter of construction, be subject to the concluding words of the second General Exception in the policy. This exception reads as follows :

"2. No claim shall attach to this Policy for any "accident, loss or damage occurring whilst the In- "sured Vehicle is being driven to the knowledge of "the Insured in an unsafe or damaged condition or "by the Insured whilst under the influence of in- "toxicating liquor or drugs or by any person who to "the knowledge of the Insured is under such in- "fluence or is incompetent to drive or has been "declined or refused renewal of Motor Insurance or "offered Motor Insurance only on special terms, but "in the case of any claim arising under Clause 2 (*b*) "of this Policy the Company will not repudiate "liability under this General Exception (No. 2) but "shall have the same right to recover under Condi- "tion No. 7 hereof as they would have on breach of "a Condition."

Endorsement No. 12 is in the form of an exception

and is perhaps more aptly read with Exception No. 2 than any other. On consideration, however, I am unable to hold in favour of such a construction. The reference to Condition 7 imports a right to recover against the insured in cases of the sort dealt with by Section 20 of the Act of 1934 and it is reasonably clear that the undertaking not to repudiate is intended to be annexed to stipulations such as those specified in the exception quoted which are void as between the insurers and third parties. To attach the undertaking to the substance of endorsement No. 12 which, as I have found, is a valid term of the contract, would, I feel, be tantamount to re-writing the contract and quite unjustifiable no matter how desirable such a modification might be in the interests of those whom the Acts sought to protect.

Mr. Nicholson, on behalf of the claimants, raised two further points which, without doing his argument any injustice, may perhaps be described as subsidiary.

First, he said that endorsement No. 12 was without consideration and, therefore, not effectual to vary the terms of the policy. I do not think this contention is one of substance. The point was not taken in the affidavits. But in my opinion the circumstances show consideration. Either endorsement No. 12 was part of the agreement for the transfer of the policy to McCleery or else it was accepted by McCleery as a stipulation which the Company required if the insurance was to continue.

Then it was said that the Company were estopped from relying upon endorsement No. 12 because of the form in which they issued the certificate of insurance. I must hold against this point also. On the authorities I doubt if estoppel could arise on such an equivocal document. But, even if it could, I cannot, on the evidence, find that the Company's failure to delete the printed words opposite heading No. 5 induced McCleery to let Leckey drive or otherwise to act to his detriment.

For the foregoing reasons I hold that neither of the defendants was covered by the policy in respect of the plaintiffs' injuries and I must, therefore, dismiss the applications.

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I do so with a regret which is all the keener because, having heard the actions, I realise that the result may be to deprive two decent, industrious people of their only hope of redress in respect of what for them was a very grievous occurrence.

I make no order as to costs. While the Company have succeeded I cannot but feel that their error in issuing the certificate of insurance encouraged, if it did not justify, the present proceedings.

Applications dismissed.

Solicitor for the plaintiffs : *D. P. Marrinan.*
Solicitors for the defendants : *J. C. W. Rea & Son.*

M. V. P.

WEST v. GREAT NORTHERN RAILWAY (IRELAND) (1).

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May, 7, 15; June 5.

Railway—Breach of statutory duty—Private level accommodation crossing—Standard of maintenance—Increase of burden of easement—Railway Clauses Consolidation Act 1845, (8 & 9 *Vict., c.* 20), *section* 68.

The obligation to maintain accommodation works under section 68 of the Railway Clauses Consolidation Act, 1845, is to be measured not according to modern standards of traffic but to those prevailing or contemplated at the time of construction.

The plaintiff's farm was bisected by a line of the defendants' railway and the two parts were connected by a crossing made as an accommodation work pursuant to the provisions of the Railway Clauses Consolidation Act, 1845. A motor tractor and rake belonging to the plaintiff and in charge of his servants were caught in the rails as they were passing over the crossing and were run into by a train driven by the defendants' servant. In an action for damages for the destruction of the motor tractor and rake the plaintiff claimed that the loss was caused by a breach of statutory duty in that the defendants had not maintained the crossing as required by section 68 of the Railway Clauses Consolidation Act, 1845. The defendants contended that their duty to maintain the crossing was limited to maintaining it in a condition sufficient for the passage of traffic in use when the crossing was originally constructed, and that the plaintiff's claim to have the crossing maintained for the passage of modern farm machinery would substantially increase the burden of the easement.

Held, that the plaintiff could not increase the burden of the easement by a user which altered or enlarged its character, nature or extent as enjoyed or acquired at the time of construction, and that the defendants' duty under the statute was only to maintain the crossing as a convenient passage for the kind of traffic which it was constructed to accommodate.

Held, however, that the plaintiff's user of the crossing was not in fact such as to increase this burden, and the accident having resulted from a failure to maintain the crossing as a convenient passage for the kind of traffic it was constructed to accommodate the defendants were accordingly liable.

ACTION tried before MacDermott J. without a jury. The plaintiff was the owner of a farm which was bisected by a single branch line of the defendants' railway. The two parts of the farm lying on either side of the railway were connected by a crossing which was

(1) In the King's Bench Division before MacDermott J.

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made about sixty or seventy years previously as an accommodation work pursuant to the provisions of the Railway Clauses Consolidation Act, 1845. On the evening of 1st August, 1944, the plaintiff's servants were taking a motor tractor towing a side delivery rake over the crossing when the implements became stuck between the rails. The plaintiff's servants made efforts to free them but without success, and shortly afterwards a goods train driven by the defendants' servant ran into and completely destroyed the tractor and rake. The plaintiff brought this action for damages and based his claim on two grounds : (1) the negligence of the defendants' servant in the driving of the train ; (2) breach of statutory duty in that the defendants had not maintained the crossing as required by section 68 of the Railway Clauses Consolidation Act, 1845 (1). The defendants in their defence traversed the plaintiff's allegations and pleaded contributory negligence on the part of the plaintiff's servants. They further contended that their dutv under section 68 of the Railway Clauses Consolidation Act, 1845, did not oblige them to maintain the crossing safe or convenient for the passage of traffic such as that concerned in this accident, which was entirely different in nature from that in use or contemplation when the railway was made. MacDermott J. found on the facts that the defendants' servant was not guilty of any negligence causing the accident in the driving and management of the train, and the case is reported only on the issue of breach of statutory duty under section 68 of the Railway Clauses Consolidation Act, 1845. The material facts on this issue will be found in the judgment.

Copeland K.C. and *Belford* for the plaintiff.

McSparran K.C. and *Topping* for the defendants.

(1) Railway Clauses Consolidation Act, 1845, sec. 68 : " The Company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway ; (that is to say) such and so many convenient . . . passages over . . . the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made."

The arguments of counsel sufficiently appear in the judgment.

Cur. adv. vult.

MACDERMOTT J. [after dealing with the issue of negligence and finding that there was no negligence in the driving and management of the train, continued]: I turn now to the allegation of breach of statutory duty. The hay-making party when on the way home consisted of Thomas Fallis driving the tractor, Stanley Spence, a boy of 15, who was riding on the rake which was coupled to the tractor by a draw bar, and William Farrell who went ahead to open the gates and see that all was clear at the crossing. These three impressed me as credible witnesses and I have no hesitation in accepting in its substance their version of what occurred at the crossing. There being no sign of the train Farrell beckoned Fallis on and the tractor with the rake behind it then commenced the crossing. The tractor was a Fordson with pneumatic rear wheels and smaller iron-rimmed wheels in front. The rake was about 6 feet long. The draw bar measured 3 feet making the total length of the attachment behind the tractor 9 feet. The width of the rake, closed for travelling, was approximately 7 feet, this measurement representing the track of its rear wheels which were of metal, about 4 feet high and with rims 3 inches wide. This implement was three-wheeled, the front wheel being of metal and about two feet in diameter. The first rail to be crossed did not cause difficulty but when the tractor came to the farther rail its off front wheel dropped down and struck the inner side of that rail and slid along it without mounting over. This sliding movement was due to the oblique nature of the crossing and Fallis countered it by reversing the tractor a short distance and then going forward to the left so as to take the rail at more of a right angle. This manoeuvre was successful in getting the tractor across and clear of the track but the front wheel of the rake then stuck and slid down the same rail in much the same manner. Fallis then stopped the tractor and he and the others endeavoured to lift the rake's front wheel up and over the

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rail. They had not succeeded in doing this when the train was heard approaching. They then tried to get the rake clear by slewing its rear wheels round in a clockwise direction. They got one rear wheel clear of the track but the back of the rake struck the bank and they then had to move clear of the approaching train leaving the rear wheels one on either side of the rail.

The crossing itself may, on the admission of the defendants that section 68 of the Act of 1845 applies to it, be taken as dating from the construction of the railway. The plaintiff who never knew the farm without it said it was made at least 60 or 70 years ago. It has been used regularly for farming purposes, including the passage of farm implements and vehicles at the times and seasons appropriate to their use. Prior to this accident no complaint had been made about the state of the crossing and no difficulty had, apparently, been experienced in negotiating it. There was no detailed evidence as to its condition immediately before the accident and nothing to show when it had last been repaired or made up, though Philip J. Murphy, one of the defendants' permanent way inspectors, said that the sleepers on this part of the track were relayed in 1943 and that the crossing surface would then have been renewed. From the circumstances of the occurrence and the evidence as to the condition of the crossing after it I find that at the time of the accident the crossing consisted of loose ballast (that is, broken stones up to 2 inches in diameter) placed between the metals and on either side of the track; that the filling was not compacted and was loose enough to be moved with the foot and to give under weight; that the surface was not level but fell away at the rails exposing part of their side surfaces; and that this exposure existed to a much greater degree than was necessary to provide flange space or otherwise allow for the due working of the railway. Richard Crozier, the plaintiff's surveyor, stated that the crossing was not safe for iron shod vehicles "on account of the slant and space on inside "of rail" and added that "the soft nature of the filling "made it worse as the wheel would sink." I accept this evidence and consider it as offering the only reasonable explanation of what in fact occurred. I also find

on the evidence adduced by both parties that it is practicable for the defendants to provide and maintain a crossing free from the defects mentioned by Mr. Crozier which will not interfere with the proper working of the railway.

By Section 68 of the Act of 1845 "The Company "shall make and at all times thereafter maintain the "following works for the accommodation of the owners "and occupiers of lands adjoining the railway; (that is "to say) such and so many convenient . . . pas- "sages over . . . the railway as shall be necessary "for the purpose of making good any interruptions "caused by the railway to the use of the lands through "which the railway shall be made." It must, I think, be assumed that the defendants duly discharged the obligation to make a "convenient" passage at the crossing in question. The matter for consideration is whether they *maintained*, in accordance with the requirements of the section, the crossing so formed. The defendants relied on the decision of the Court of Appeal in *Great Northern Railway Company v. M'Alister* (1), and contended that their obligation to maintain did not oblige them to keep the crossing safe or convenient for the passage of traffic, such as that concerned in this accident, which was entirely different in nature from that in use or contemplation when the railway was made. In *M'Alister's Case* (1) the railway company succeeded in obtaining an injunction against the defendant who had sought to use a level crossing provided for the accommodation of his lands, which were used as a farm when the railway was made, for the passage of a traction engine and waggons drawing stones from a quarry he had opened. The facts are very different from those of the present case but the judgments go to show that the extent of the obligation to provide accommodation under section 68 of the Act of 1845 must be related to the actual or contemplated user of the lands concerned at the time of construction. As Fitzgibbon L.J. put it in the course of his judgment, at page 605, "The owner of the adjoining lands was "entitled, when the railway was made, to a convenient "passage over the railway sufficient to make good, so

(1) [1897] 1 I.R. 587.

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"far as possible, any interruption which the construc-
"tion of the railway caused by severance in the working
"of his farm, including, I should say, any alteration or
"extension of that working which could or ought to
"have been contemplated by the parties when the
"accommodation works were made and were accepted."
This dictum was considered and expressly approved by the English Court of Appeal in *Great Western Railway Company v. Talbot* (1). These decisions, in my opinion, do more than define the nature of the works required to be provided by section 68. They also show that the landowner is not entitled to use an accommodation crossing provided thereunder so as substantially to increase the burden of the easement by altering or enlarging its character, nature or extent as enjoyed or acquired at the time of construction. Whether, in any particular case, the burden has been increased by a change of user is a question of fact. See *Taff Vale Railway Company v. Gordon Canning* (2).

Now it is true that these authorities do not deal directly with the obligation to maintain which is imposed by section 68. They have, however, an obvious bearing on that obligation as, on the wording of this enactment, I think the obligation to maintain must be construed as commensurate with the obligation to make. I cannot find anything in the statute to place the company under a duty to maintain so as to meet not only the demands in respect of which the work had to be made but additional demands caused by an appreciable increase in the burden of the easement. I do not think the obligation to maintain under section 68 can be regarded as any different in this respect from that imposed by section 46 in relation to public highways and it is now clear that the latter obligation must be measured not according to modern standards of traffic but to those prevailing at the time of construction. See *Attorney General v. Great Northern Railway Company* (3).

Applying these principles to the facts of the present case the first matter for consideration is whether the plaintiff was at the time of the accident using the

(1) [1902] 2 Ch. 759.
(2) [1909] 2 Ch. 48.
(3) [1916] 2 A.C. 356.

crossing in a manner which increased the burden of the easement. I do not think he was. He was using the crossing for the purposes of his farm and there is nothing to distinguish those purposes from the purposes for which the land was used when the railway was made. It is of course true that the burden of an easement may be increased by more than a change of purpose. The same purpose may be pursued more intensively or the vehicles or implements used in the enjoyment of the easement may have so altered as to increase the burden by their physical effect or presence on the servient tenement. On the evidence here, however, I see nothing to justify the view that the burden was increased to any appreciable degree in any such manner. No doubt petrol driven tractors were not thought of in connection with agriculture when this railway was made and it may also be as true to say that the plaintiff's side delivery hay rake has little in common with the implements used for the same purpose 60 or 70 years ago. But I can find nothing in the evidence to show or even suggest that the use of modern methods in the operation of hay-making, as exemplified by the employment of the machinery to which this claim relates, added at all to the burden of the easement. The wheels which caught the rail on this oblique crossing were of iron, but so far as I am aware they present no feature which can be described as novel or different in any material respect from the wheels in use when the railway was made; nor can I see in the evidence anything which would warrant the conclusion that either of these wheels carried more weight, and was therefore more likely to sink, than the wheels of farm vehicles and implements in common use when the crossing was first constructed. This whole question does not turn on new methods, but on the results of new methods, and looking to these I see no reason for thinking that what occurred on the occasion of this accident could not also have occurred during the passage of, say, a horse drawn waggon or reaping machine.

I am, therefore, of opinion and find that the plaintiff's user of the crossing was not such as to increase the burden of the easement and further that the state of the crossing which caused the wheels to catch the rail, as

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already described, was due to the failure on the part of the defendants to maintain the crossing as a convenient passage for the kind of traffic it was made to accommodate.

There remains the issue of contributory negligence. The case in support of this plea was that the accident was due to the negligence of the plaintiff's servants in not sending one member of the hay-making party to the curve to give the approaching train timely warning of the obstruction. No attempt was made to do this and Thomas Fallis stated that the thought of taking this step never occurred to him. There would have been time to send someone to the curve, as the hay-making party must have spent something between 5 and 10 minutes in their attempt to get clear of the crossing. I am satisfied, however, that during this time all their energies were bent on getting the tractor and rake across and I do not think the failure to give the train a special warning was in the circumstances negligent. To my mind the reaction of the plaintiff's servants to this unexpected and unusual occurrence was natural and reasonable enough. It may well be that, if they had done at once what the defendants now say they should have done, the accident would have been avoided. It is, however, very easy to be wise after the event and in a case like the present I do not think the question of responsibility can fairly turn on a consideration of this sort. The law requires much of the reasonable man but I do not think it has yet endowed him in an emergency with all the fruits of the experience.

In the result I hold that the plaintiff is entitled to recover. Both tractor and hay rake were damaged beyond repair. The amounts claimed for them, viz., £200 and £35 respectively, are on the evidence reasonable and so is the figure of £50 for consequential loss. Accordingly I measure the plaintiff's damage at £285. I give judgment for this sum with costs.

Judgment accordingly.

Solicitor for the plaintiff : *E. C. Ferguson.*
Solicitor for the defendants : *C. Bailie-Gage.*

J. McC.

THE MINISTRY OF AGRICULTURE FOR NORTHERN IRELAND, APPELLANT; ROBERT JAMES TURTLE, RESPONDENT (1).

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May 16; June 27; Oct. 30.

Food and Drugs—Sale of Milk—Adulteration—Article purchased for use and not for analysis—Certificate from official analyst condition precedent to prosecution—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict., c.* 63), *secs.* 6, 10, 12, 13, 20, 21—*Jurisdiction of King's Bench Division in Northern Ireland.*

The respondent was prosecuted by the appellant for selling to the appellant a quantity of new milk which was not of the nature, substance and quality demanded by the appellant, contrary to section 6 of the Sale of Food and Drugs Act, 1875, in that the milk was adulterated with water. The appellant prosecuted as a private purchaser and the milk had not been analysed by a public analyst under section 12 of this Act. At the hearing before the resident magistrate it was contended by the respondent that it was a condition precedent to a prosecution under section 6 of this Act that the article should be analysed by a public analyst and the analyst's certificate tendered in evidence, and the resident magistrate being of this opinion dismissed the charge but stated a case for the opinion of the King's Bench Division.

Held, by the King's Bench Division (Black and MacDermott JJ.) that the resident magistrate was right in dismissing the charge, and that the obtaining and production of the certificate of a public analyst is as indispensable a condition to prosecution where the prosecution is brought under section 6 at the suit of a purchaser for consumption or resale as it is where the prosecution is brought under section 13 at the suit of an officially appointed inspector.

R. (Barry) v. Mahony [1909] 2 I.R. 490 followed.

Buckler v. Wilson [1896] 1 Q.B. 83 not followed.

Per Black J.: That the matter being one of doubt and the construction of the Act contended for by the respondent being a reasonably possible construction the point should be resolved in his favour on the ground that the Act was a penal Act.

By the court: The King's Bench Division while holding itself entitled to reconsider decisions of the former Irish King's Bench Division will ordinarily follow such decisions unless clearly persuaded that they are wrong.

CASE STATED by the resident magistrate sitting at Ballymena Petty Sessions.

(1) In the King's Bench Division before Black and MacDermott JJ.

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At Ballymena Petty Sessions held on the 9th day of March, 1945, the complainant, the Ministry of Agriculture, charged the defendant, Robert J. Turtle, that the defendant on the 14th day of December, 1944, at Rathkenny Creamery in the above named petty sessions district and county, did sell, to the prejudice of the said Ministry, a quantity of new milk which was not of the nature, substance and quality of the new milk demanded by the said Ministry, contrary to section 6 of the Sale of Food and Drugs Act, 1875 (1), in that the same contained a quantity of added water.

Evidence was given on behalf of the complainant that on the 14th day of December, 1944, the defendant sold to the complainant two churns or cans of new milk; that on the morning of the said 14th December these two cans of milk were collected on the public road at the end of the lane leading to the defendant's house (where they had been left by the defendant) by a lorry acting for the complainant, and brought on this lorry to Rathkenny Creamery; that at this Creamery a Mr. James Jordan, a chemist employed by the com-

(1) Sale of Food and Drugs Act, 1875, sec. 6: "No person shall sell "to the prejudice of the purchaser "any article of food or any drug "which is not of the nature, sub- "stance, and quality of the article "demanded by such purchaser, "under a penalty not exceeding "twenty pounds."

Sec. 12: "Any purchaser of an "article of food or of a drug in any "place being a district, county, city, "or borough where there is an "analyst appointed under this or "any Act hereby repealed shall be "entitled, on payment . . . to have "such article analysed by such "analyst, and to receive from him "a certificate of the result of his "analysis."

Sec. 13: "Any medical officer of "health [or other named officials] ". . . may procure any sample of "food or drugs, and if he suspects "the same to have been sold to him "contrary to any provision of this "Act, shall submit the same to be "analysed by the analyst of the "district or place for which he "acts . . ."

Sec. 20: "When the analyst hav- "ing analysed any article shall have "given his certificate of the result "from which it may appear that an "offence against some one of the "provisions of this Act has been "committed, the person causing the "analysis to be made may take "proceedings for the recovery of "the penalty herein imposed for "such offence . . ."

Sec. 21: "At the hearing of the "information in such proceeding "the production of the certificate "of the analyst shall be sufficient "evidence of the facts therein "stated, unless the defendant shall "require that the analyst shall be "called as a witness . . ."

plainant in the Research Division of the complainant took a sample of the milk from each can, having first stirred the milk; that he forthwith brought both samples to the complainant's laboratory at Dromona Milk Depot outside Cullybackey, and there submitted each sample to a chemical test known as the Hortvet test. Mr. Jordan gave evidence that in this test the milk is brought to the freezing point and that, in the case of one sample of the milk, the freezing point was -0.417 deg. Cent., and that this proved that this milk contained 24.2 per cent. of added water; that, in the case of the other sample of this milk, the freezing point was -0.507 deg. Cent., and that this proved that this milk contained 7.8 per cent. of added water.

The defendant gave evidence to the effect that on the 14th December he had 10 cows and that these cows had been milked either by his daughter or himself; that on the morning of this date he put the milk in the two cans and left the cans at the end of his lane to be collected for the complainant; that he had not added water to the milk or interfered in any way with it, and that, when he left the cans at the end of the lane, the milk in them was in the same condition as when it had come from the cows; that he was not aware that samples of this milk had been taken or tested or that there was any suggestion of anything being wrong with the milk until a summons containing the charge mentioned above was served on him on the 5th February, 1945, almost two months later. His daughter, Miss Turtle, gave evidence to the effect that she had helped her father to milk the cows at the time in question, and that she had not interfered with the milk in any way.

In this case the complainant prosecuted as a private purchaser, and the milk had not been analysed by a public analyst under the Sale of Food and Drugs Act, 1875, or by anyone else. Counsel, who appeared for the complainant, contended that, where a prosecution of this kind was brought by a private purchaser, an analysis by a public analyst was not necessary, and that an analyst's certificate need not be given in evidence, and that it was sufficient if adulteration could be

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proved by other satisfactory evidence. He referred to the English case of *Buckler v. Wilson* (1), in which it was held that a certificate of the public analyst was not necessary, and also to the Irish case of *R.* (*Barry v. Mahony* (2), in which it was held that a certificate should have been obtained. He contended that the decision in *Barry's Case* (2) did not apply to this case and relied on a passage at the end of the judgment of Mr. Justice Kenny. He submitted that, as an analysis did not form portion of the proofs of the complainant in this prosecution, an analyst's certificate was not necessary. The solicitor, who appeared for the defendant, placed strong reliance on *Barry's Case* (2) and contended that, in the absence of an analysis and a certificate, the prosecution must fail.

The resident magistrate adjourned the case to Ballymena Petty Sessions on the 23rd March, 1945, and at that Court he held that the passage in the judgment of Mr. Justice Kenny in *Barry's Case* (2) would not justify him in holding that *Barry's Case* (2) did not apply to this prosecution in view of the very wide and definite terms of the judgment of Mr. Justice Gibson in that case (in which Mr. Justice Boyd concurred) in which he expressly considered and disagreed with the judgment of Lord Russell of Killowen in *Buckler v. Wilson* (1) where he said : " There is nothing in the Act to prevent " the proof of an offence by other satisfactory evidence, " nor is it necessary that the purchaser should obtain " the certificate of the ' public analyst ' except where " he purchases with an intention of submitting to " analysis " ; that *Barry's Case* (2) did apply, and that, having regard to it, the milk should have been analysed by the public analyst and his certificate tendered in evidence. The resident magistrate therefore dismissed the charge on the merits and allowed four guineas costs. The question for the opinion of the Court was whether the resident magistrate was right in law in dismissing the charge for the reason stated.

Patton K.C. and *McVeigh* for the appellant, the Ministry of Agriculture.

(1) [1896] 1 Q.B. 83. (2) [1909] 2 I.R. 490.

The net point for decision is whether a certificate from a public analyst is necessary.

Where a prosecution is brought by a private purchaser, an analysis by a public analyst is not necessary and an analyst's certificate need not be given in evidence.

The first paragraph of section 20 of the Sale of Foods and Drugs Act, 1875, applies only to cases in which the Act in express terms makes it obligatory to submit the article to an official analyst for analysis. The section applies only to cases of test purchases. The case of a purchaser who purchased the article for use is quite different. There is nothing in the Act saying specifically that a purchaser of this character must have the article analysed by an official analyst. We say that an analysis by a public analyst is not a portion of the proof.

There is a conflict of law in England and Ireland on this point. In *Buckler v. Wilson* (1) it was held that a certificate of the public analyst was not necessary.

The decision in *R. (Barry) v. Mahony* (2) does not apply to the present case.

Lord Russell of Killowen C.J., in his judgment in *Buckler v. Wilson* (1), said : " It seems to me, however, " that the effect of section 21 is merely to make the " production of a certificate of an analysis under " section 14 of itself sufficient evidence of the facts " therein stated. There is nothing in the Act to pre- " vent the proof of an offence by other satisfactory " evidence—nor is it necessary that the purchaser " should obtain the certificate of the ' public analyst ' " except where he purchases ' with an intention ' of " submitting to analysis. Section 12 merely gives him " *the right* on certain payments to claim an analysis " from the public analyst."

In *Connor v. Butler* (3) Kenny J. points out in his judgment that " The Sale of Food and Drugs Act, " 1875, contemplates two classes of purchasers—(1) " members of the general public, and (2) officers of the " local authority." Later on, he says : " The 20th

(1) [1896] 1 Q.B. 83, 90.
(2) [1909] 2 I.R. 490.
(3) [1902] 2 I.R. 569, 581.

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"section dealt with prosecutions by members of the "public and officials of the local authority, and pro- "vided that in cases where an analysis was necessary "as one of the proofs of an offence, the person who "caused the analysis to be made might take proceed- "ings for recovery of the penalty *when* the analyst had "given his certificate of the result of his analysis."

In Halsbury's Laws of England (Hailsham edition) volume 15, page 143, paragraph 227, it is stated that "The giving of a certificate by a public analyst is a "condition precedent to a prosecution arising out of a "purchase by a sampling officer of a sample for the "purpose of analysis, though not to proceedings by a "private purchaser."

Bell's Sale of Food and Drugs (9th edition) states at page 153: "It seems now to be clearly settled that "where an article has been purchased for the purpose "of analysis the certificate of an analyst is usually a "condition precedent to a public prosecution for "adulteration. . . . On the other hand, in the "case of a private prosecution it would appear that "the certificate is not a condition precedent, for the "Judgment of Lord Russell of Killowen C.J., Pollock "B., and Wright J. in *Buckler v. Wilson* (1), in which "the prosecutor was a private individual, contains the "following passage: "There is nothing in the Act to "prevent the proof of an offence by other satisfactory "evidence; nor is it necessary that the purchaser "should obtain the certificate of the public analyst "except where he purchases with an intention of sub- "mitting to analysis.

"In *R.* (*Barry*) *v. Mahony* (2), the Irish Court of "King's Bench took the opposite view, pointing out "that the passage above quoted was merely an *obiter* "*dictum*, because a certificate had been obtained, and "stating that the English Court had misapprehended "the judgments in *Enniskillen Guardians v. Hilliard* "(3). But it is submitted that *Buckler v. Wilson* (1) "being a considered judgment of a court of three "judges, would be followed in England notwithstand- "ing *R.* (*Barry*) *v. Mahony*" (2).

(1) [1896] 1 Q.B. 83.
(2) [1909] 2 I.R. 490.
(3) (1884) 14 L.R.Ir. 214.

It is pointed out in O'Connor's Irish Justice of the Peace, volume 2, page 466, that "As to a prosecution "where an article has been bought by a private pur- "chaser in the ordinary way, there is a conflict of "opinion between the English and Irish Courts as to "whether an analyst's certificate is necessary."

The offence can be proved by any evidence that is legal evidence.

[They also referred to *Smart & Son v. Watts* (1).]

Curran K.C. and *McCall* for the respondent.

This legislation contemplates a statutory method of ascertaining whether or not the milk has been adulterated. The test must be carried out by the public analyst, an independent authority.

The summons is founded on an alleged offence under section 6 of the Sale of Food and Drugs Act, 1875. The third paragraph of section 20 applies to all offences under section 6, and that being so, the obtaining of a certificate of an official analyst is a condition precedent to the institution of a prosecution under section 6. The Legislature assumed that every prosecution for adulteration would be founded upon such an analysis.

Buckler v. Wilson (2) is not a decision on the point now before the Court, although it is strongly relied on by the appellant. It is an express decision on section 14 of the Sale of Food and Drugs Act, 1875. The point of the decision in *Buckler v. Wilson* (2) is quite irrelevant to the question before the Court. In the present case the milk was not purchased with the intention of having it submitted to analysis. In so far as the judgment of Lord Russell of Killowen C.J. in *Buckler v. Wilson* (2) relates to a wider issue it is entirely *obiter*, and is not even of much persuasive authority.

The decision in *Enniskillen Guardians v. Hilliard* (3) was also on section 14. This again is a decision on an entirely different point.

Dowse B. expresses the view in *Enniskillen Guardians v. Hilliard* (3) that in any prosecution under the

(1) [1895] 1 Q.B. 219.
(2) [1896] 1 Q.B. 83.
(3) (1884) 14 L.R.I. 214.

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Sale of Food and Drugs Act, there must be the production of an analyst's certificate.

The dicta of Dowse B. in *Enniskillen Guardians v. Hilliard* (1) can be set against the dicta of Lord Russell of Killowen C.J. in *Buckler v. Wilson* (2).

We rely on the words used by Kenny J. in his judgment in the *R. (Barry) v. Mahony* (3), where he said: "The right is given to a person who, having "caused an analysis to be made, has, before putting "the law in motion, obtained a certificate of analysis "showing that an offence against some one of the pro- "visions of the Act had been committed. The ob- "taining and production of such a certificate is, in my "opinion, a condition precedent to the prosecution "where adulteration is the basis of the offence and an "analysis is necessary."

The Court must have regard to the object of the legislation which is to prevent the circulation to the public of poisonous and deleterious matter. The words cited from Kenny J.'s judgment in *R. (Barry) v. Mahony* (3) apply to the present case. Gibson J.'s judgment is also directly in point.

In *Collier v. Down County Council* (4) Babington L.J. said in his judgment: "Strictly speaking, the deci- "sions of the Court of Appeal in Ireland are not binding "on us but we follow them as a matter of course unless "there are very strong reasons to the contrary and "more especially in cases in which the law as declared "has been accepted as the law of the land for any "considerable time."

Comity among judges demands that a reasonable amount of conformity should prevail among Courts of co-ordinate jurisdiction.

The decision in *R. (Barry) v. Mahony* (3) should in the words of Babington L.J. in *Collier v. Down County Council* (4) be followed "as a matter of course." To do otherwise would be a clear departure from long and settled practice.

(1) (1884) 14 L.R. Ir. 214.
(2) [1896] 1 Q.B. 83.
(3) [1909] 2 I.R. 490, 497, 498.
(4) [1941] N.I. 113, 120.

[They also referred to *The Vera Cruz* (*No.* 2) (1), *Guardians of St. Leonard's Shoreditch v. Franklin* (2), *Smart & Son v. Watts* (3)].

Cur adv. vult.

BLACK J.: The question for decision in this case is whether the obtaining of a certificate of analysis from an official analyst is a condition precedent to the institution of a prosecution for an offence under section 6 of the Sale of Food and Drugs Act, 1875, in respect of the sale of an article of food in a case where the article was not purchased with the intention of having it submitted to analysis but was simply purchased in the ordinary course of business for consumption or resale.

The difficulty arises from the curious wording of section 20 of the Act of 1875. In order, however, to appreciate the difficulty it is necessary to look shortly at the earlier provisions of the Act.

Section 6 of the Act provides that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality demanded by such purchaser, under a penalty not exceeding £20. A proviso to the section makes certain exceptions which are not here relevant.

Sections 10 and 11 provide for the appointment by local authorities of official analysts.

Section 12 entitles *any* purchaser of an article of food or of a drug, to have such article analysed (upon payment of a fee) by an official analyst appointed under the Act.

Section 13 of the Act deals with what have been called test purchases by officially appointed inspectors. It empowers such inspectors to obtain samples of food and drugs and directs that if an inspector suspect any sample to have been sold to him contrary to any provision of the Act, he *shall* submit it to be analysed by an official analyst, and the section then goes on to direct that upon receiving payment of the appropriate fee the analyst *shall* with all convenient speed analyse

(1) (1884) 9 P.D. 96.
(2) (1878) 3 C. P. D. 377.
(3) [1895] 1 Q.B. 219.

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the sample and give the inspector a certificate specifying the result of the analysis.

Sections 14 and 15 set out in detail the procedure to be adopted by a person purchasing an article with the intention of submitting it to analysis.

Section 20 commences a group of sections under the heading "Proceedings against Offenders." Section 20 itself consists of three paragraphs. The second paragraph is general and comprehensive. It deals with all penalties imposed by the Act and directs that in Ireland (outside the Dublin Metropolitan Police District) all such penalties are to be recoverable and proceedings are to be taken at Petty Sessions subject and according to the provisions of the Petty Sessions (Ir.) Act, 1851, and any Act amending the same.

The third paragraph of section 20 merely provides that every penalty imposed by the Act may be reduced or mitigated by the justices.

The first paragraph of the section is the one which we have particularly to consider. This paragraph reads as follows:

> "When the analyst having analysed any article "shall have given his certificate of the result, from "which it may appear that an offence against some "one of the provisions of this Act has been com- "mitted, the person causing the analysis to be made "may take proceedings for the recovery of the "penalty herein imposed for such offence, before any "justices in petty sessions assembled having juris- "diction in the place where the article or drug sold was "actually delivered to the purchaser, in a summary "manner."

The first point which strikes one in reading section 20 is that, while section 6 purports in perfectly general terms to make it an offence to sell an article of food not of the nature, substance and quality demanded by the purchaser, the first paragraph of section 20 appears to prescribe a condition which, in some cases at any rate, must be fulfilled before proceedings for such an offence can be instituted. One effect, no doubt, of this first paragraph of section 20 is to provide that the place of actual delivery of the article is to determine which

justices are to have jurisdiction upon a prosecution (*R. v. Beacontree JJ.* (1) per Lord Reading C.J. But I do not think that the paragraph can, as was suggested during the argument, be read as intended merely to make provision in regard to the venue of proceedings. The whole frame and wording of the paragraph seem to me to show that the keynote of the paragraph is to be found in the introductory phrase "When the analyst having analysed any article shall "have given his certificate of the result," and that this phrase is clearly intended to make the giving of the analyst's certificate a condition precedent to any prosecution to which the paragraph applies. The question then is, to what precise classes of case is the paragraph intended to apply. Obviously the paragraph cannot apply to all prosecutions under the Act. It cannot apply to a prosecution under section 17 for refusing to sell an article of food to an official inspector. It cannot apply to a prosecution under section 4 for ordering a person to adulterate a drug. It can only apply to cases where the offence can be established by an analysis of the article sold. Here we come to the real difficulty in the case. The respondent contends that the paragraph applies to all cases of alleged offences under section 6 of the Act and that accordingly the obtaining of the certificate of an official analyst is a condition precedent which must be fulfilled before any prosecution can be instituted for an offence under section 6. The appellants, on the other hand, contend that the paragraph applies only to cases in which the Act in express terms makes it mandatory to submit the suspected article to an official analyst for analysis. They say that the section only applies to cases of test purchases made by an official inspector under section 13 of the Act. In the case of such a purchase the inspector must under the provisions of the section submit the sample for analysis if he intends to institute proceedings in respect of it, and it is clear that in such a case the official analyst's certificate must be obtained before the proceedings are instituted (*Smart & Son v. Watts* (2). The case, however, of a purchaser who

(1) [1915] 3 K.B. 388, 398. (2) [1895] 1 Q.B. 219.

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purchased the article in the ordinary course for consumption or resale, and not for the purposes of analysis stands, according to the appellants' argument, on a totally different footing. They point out that, while section 12 entitles such a purchaser to have the purchased article analysed by an official analyst upon payment of the proper fee, yet there is nothing in the Act to say explicitly that such a purchaser *must* have the article so analysed. They point to cases in which such a purchaser could conceivably establish without any analysis that an article sold to him was not of the nature, substance and quality demanded, and they contend that, in the absence of any provision in the Act compelling such a purchaser to have resort to the services of the official analyst, the first paragraph of section 20 must be read as referring only to cases in which the Act makes it mandatory to submit the sample for analysis and not to cases in which the earlier sections of the Act merely empower the purchaser to have the purchased article analysed without compelling him to do so.

In answer to these contentions it is said on behalf of the respondent that the first paragraph of section 20 is expressed in general terms and it is contended that to confine its provisions to certain cases only of adulteration is to read into the paragraph more than is expressed in it. It is suggested that from a perusal of the Act it is reasonably clear that the Legislature assumed that every prosecution for adulteration would be founded upon an analysis, and that the analysis would be made by an independent officially appointed analyst and not by an analyst of the purchaser's own choosing. It is urged that no sufficient reason can be suggested why the Legislature should provide that an inspector could not institute a proceeding on foot of a test purchase without having obtained a certificate from an official analyst but that a purchaser for consumption or resale should be free to institute a prosecution without such a certificate. It is, accordingly, contended that the Court should be slow to attribute to the Legislature a construction which, it is said, is manifestly illogical. And in reply to the argument that there are cases where

a purchaser could conceivably establish without an analysis that an article was not of the nature, substance and quality demanded, it is pointed out that this would apply equally as well in the case of an inspector purchasing for test purposes as in the case of an ordinary purchaser who had bought for consumption or resale, and that in the case of the inspector the Act is quite clear that he could not prosecute without first obtaining an analysis.

The impression which I get in reading the Act of 1875 is that the draftsman assumed that upon any prosecution for an offence under section 6 the offence would be proved by an analysis of the suspected article. I cannot help feeling that the draftsman never had in mind the possibility of such an offence being proved in any other way. This impression is strengthened by a perusal of the earlier Acts, to the provisions of which MacDermott J. directed attention. Moreover I think it is legitimate to say that this view is supported by the provision in section 13 of the Act of 1875 that there must be an analysis if proceedings are contemplated on foot of a test purchase ; there is no suggestion here that a case might possibly arise in which the offence could be adequately established without an analysis. And I think too that it was assumed that the analysis would always be made by an official analyst appointed under the Act. It would be difficult, however, to maintain that these conclusions clearly follow from the actual wording of the Statute. Whether the draftsmanship of the Act of 1875 as a whole merits the judgment pronounced upon it by Dowse B. in *Enniskillen Guardians v. Hilliard* (1), the Act certainly does not contain any clear or explicit provision in regard to the particular point which has now arisen for our decision. One is disposed to infer that the point simply did not occur to the draftsman. Reading the Statute as I find it and without the assistance to be derived from reported cases, I would find it difficult to pronounce with any feeling of confidence how the provisions actually made in the Statute are to be interpreted as applying to the circumstances of the present case.

(1) (1884) 14 L.R. Ir. 214, 224.

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In this state of uncertainty we turn for guidance to reported decisions. There appear to be three reported cases, two Irish and one English, in which opinions have been judicially expressed upon the point which we have to decide.

The first of these cases in order of date is *Enniskillen Guardians v. Hilliard* (1), a decision of Dowse B. and Andrews J. The point actually decided in that case was that the provisions of section 14 of the Act of 1875 do not apply except in cases where the purchase was made with the intention of submitting the purchased article for analysis, and that accordingly the notification to the seller prescribed by section 14 was not necessary in the case of a private person purchasing for consumption and not for analysis. Both of the members of the Court, however, reviewed the provisions of the Act at some length, and it appears tolerably clear from their judgments that both of them assumed that a prosecution for adulteration under section 6 would always be founded upon an analysis by an official analyst, even though the purchase had been a purchase by a private person for consumption and not a test purchase by an official inspector. Thus at p. 223 Dowse B. says : " Section 10 gives power to appoint a " public analyst. This section, taken in connexion " with sections 11, 12 and 13," (note the reference to section 12) " seems to contemplate that no prosecution " can be instituted unless the article has been analysed " by the proper person appointed to do so." And at p. 228, after referring to section 12 and section 20 at some length (again note the reference to section 12) Andrews J. says : " So far the Act does not appear to " present any difficulty. A purchaser of an adulter- ' ated article who has had it analysed by an official " analyst, from whose certificate it appears that an " offence against the Act has been committed, is en- " abled to take the prescribed proceedings against the " seller."

The next case is the English case of *Buckler v. Wilson* (2), a decision of a Divisional Court consisting of Lord Russell of Killowen C.J., Pollock B., and Wright J.

(1) (1884) 14 L.R. Ir. 214. (2) [1896] 1 Q.B. 83.

The same point arose for decision in that case as in *Enniskillen Guardians v. Hilliard* (1), namely, whether the notification to the seller prescribed by section 14 of the Act of 1875 was necessary in a case where the purchase had not been made for test purposes or with the intention of submitting the purchased article to analysis. The English Court decided this point in the same way as the Irish Court had done. The point submitted by the Resident Magistrate in the present case did not arise for actual decision in *Buckler v. Wilson* (2). In that case, just as in the *Enniskillen Case* (1) the substance alleged to have been adulterated had in fact been submitted for analysis by an official analyst and the analyst's certificate had been obtained. Lord Russell of Killowen, however, in his judgment (which was concurred in by the other members of the Court) adverted to the point which we have now to decide. At p. 90 he says: "It seems to me, however, that the "effect of s. 21 is merely to make the production of a "certificate of an analysis under s. 14 of itself sufficient "evidence of the facts therein stated. There is noth-"ing in the Act to prevent the proof of an offence by "other satisfactory evidence—nor is it necessary that "the purchaser should obtain the certificate of the "'public analyst' except where he purchases 'with "'an intention' of submitting to analysis. Section 12 "merely gives him *the right* on certain payments to "claim an analysis from the public analyst." It thus appears that on the question whether the obtaining of a certificate from an official analyst is a condition precedent to the institution of a prosecution where the article was purchased for consumption and not for analysis, the English Court took the opposite view to that which had been taken by the Irish judges in the *Enniskillen Case* (1). Strangely enough, however, a very few sentences later in his judgment Lord Russell goes on to say: "I wish to say that I agree with the "reasoning of the learned judges in the Irish case, and "I entirely adopt the view of the Act expressed by "them."

(1) (1884) 14 L.R. Ir. 214. (2) [1896] 1 Q.B. 83.

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The third case is *R. (Barry) v. Mahony* (1). While the point which we have to consider in the present case did not arise for actual decision in the *Enniskillen Case* (2) or in *Buckler v. Wilson* (3), the same cannot be said of *R. (Barry) v. Mahony* (1). In this case the Irish King's Bench Division—the Court consisting of Gibson, Boyd and Kenny JJ.—had to determine the precise point which is now again raised in the present Case Stated, and after considering the judgments in the *Enniskillen Case* (2) and *Buckler v. Wilson* (3) expressly declined to follow the dictum of Lord Russell of Killowen in the latter case and decided that the analyst's certificate is an indispensable requisite in what Gibson J. calls a purchaser prosecution as well as in an official prosecution. So far as I am aware *R. (Barry) v. Mahony* (1) is the only reported decision on the exact point and, so far as I have been able to discover, it has not been questioned in any later case.

What should be the attitude of this Court to *R. (Barry) v. Mahony* (1)? The Court which decided that case was a Court exercising in this part of the United Kingdom the same jurisdiction as is now exercised by this Court. It would appear, however, that we are not absolutely bound by the decision of the old Irish King's Bench Division. The Court of Appeal in Northern Ireland has held that it has jurisdiction to reconsider decisions of the former Irish Court of Appeal but it regards this jurisdiction as one which should be sparingly exercised (per Moore L.J. in *R. (Greenaway) v. Armagh JJ.* (4)). In *Collier v. Down County Council* (5), Babington L.J. says: "Strictly speaking, the decisions "of the Court of Appeal in Ireland are not binding on "us but we follow them as a matter of course unless "there are very strong reasons to the contrary and "more especially in cases in which the law as declared "has been accepted as the law of the land for any "considerable time." So far as this Court is concerned, I am of opinion that we ought to follow the principle laid down by the Court of Appeal and, while holding

(1) [1909] 2 I.R. 490.
(2) (1884) 14 L.R. Ir. 214.
(3) [1896] 1 Q.B. 83.
(4) [1924] 2 I.R. 55, 62.
(5) [1941] N.I. 113, 120.

ourselves entitled to reconsider decisions of the former Irish King's Bench Division, should ordinarily follow such decisions unless clearly persuaded that they are wrong. As regards *R.* (*Barry*) *v. Mahony* (1), I think we should be especially slow to upset a decision which turned not upon any point of legal principle but upon a doubtful and difficult question as to the application of certain somewhat obscurely expressed statutory provisions to a particular set of circumstances. And we should feel all the greater hesitation when we recall that the statute is a penal one and that the decision of the Irish King's Bench had resolved the question in favour of the defendant. The appellants have failed to convince me that the decision in *R.* (*Barry*) *v. Mahony* (1) is wrong and, accordingly, I am of opinion that we ought to follow it in this Court.

Quite apart from the weight and authority to be attached to the actual decision in *R.* (*Barry*) *v. Mahony* (1), there is another ground upon which I would be satisfied to decide this case in favour of the respondent. Notwithstanding the opinion to the contrary expressed by Day J. in *Newby v. Simms* (2), I have no doubt that the Act of 1875 is a penal Act. It is a well established principle that if there are two reasonably possible constructions which can be given to penal sections of a Statute, the Court ought to adopt the construction which enables the defendant to escape the penalty. A good modern instance of the application of this principle will be found in the decision of the English Court of Appeal in *Remmington v. Larchin* (3). As is said in Maxwell on the Interpretation of Statutes, in a passage quoted by Scrutton L.J. in *Remmington v. Larchin* (3) at p. 410: "Where an equivocal word or ambiguous "sentence leaves a reasonable doubt of its meaning "which the canons of interpretation fail to solve, the "benefit of the doubt should be given to the subject "and against the Legislature which has failed to ex- "plain itself." To put the respondent's argument on this point at its very lowest, I think it would be difficult to say that the construction for which he contends is

(1) [1909] 2 I.R. 490.
(2) [1894] 1 Q.B. 478.
(3) [1921] 3 K.B. 404, 410.

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not a reasonably possible construction of the Act. It was assumed, apparently without question, to be the natural construction by Dowse B. and Andrews J. in the *Enniskillen Case* (1). And it is the construction which commended itself to Gibson, Boyd and Kenny JJ. in *R.* (*Barry*) *v. Mahony* (2) after they had considered Lord Russell of Killowen's expression of a contrary opinion in *Buckler v. Wilson* (3). Whether it is the construction really intended by the Legislature or not, I have no hesitation in holding that it is a sufficiently reasonable construction to entitle the respondent to contend that the matter is at least so pregnant with doubt that it ought—the Statute being a penal one—to be resolved in his favour.

I am accordingly of opinion that the question submitted by the learned Resident Magistrate should be answered by stating that in the opinion of this Court he was right in law in dismissing the charge preferred against the respondent for the reason set out in the Case Stated.

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MACDERMOTT J.: The net question for determination in this case is whether in a prosecution for an offence under section 6 of the Sale of Food and Drugs Act, 1875, the complainant, if an ordinary purchaser—and by that I mean a purchaser purchasing for use and not for test—must procure and produce as part of his proofs evidence of analysis by a public analyst acting under that Act.

The point is one of considerable difficulty. It involves the construction of an ill-drafted statute, and it has been the subject of a notable difference of judicial opinion.

The Act of 1875 was passed to make better provision for the sale of food and drugs in a pure state. Section 1 repeals certain earlier statutes including the Adulteration of Food and Drink Act, 1860 (23 & 24 Vic. c. 84) and the Adulteration of Food and Drink and of Drugs Act, 1872 (35 & 36 Vic. c. 74). Sections 3 and 4 prohibit the mixing of food and drugs with injurious

(1) (1884) 14 L.R. Ir. 214.
(2) [1909] 2 I.R. 490.
(3) [1896] 1 Q.B. 83.

ingredients with intent to sell and also the sale of such mixtures. Section 6 is framed in wide terms, the material part reading :—

"No person shall sell to the prejudice of the pur-
"chaser any article of food or any drug which is not
"of the nature, substance, and quality of the article
"demanded by such purchaser, under a penalty not
"exceeding twenty pounds. . . ."

Sections 7 and 8 provide for the sale of compounded articles and section 9 deals with fraudulent abstraction from articles of food. Section 10 provides for the appointment of analysts by local authorities and, under section 11, an analyst appointed by one authority may be engaged by another in respect of a neighbouring district. Section 12 entitles any purchaser of an article of food or of a drug to have it analysed by an analyst so appointed and to receive his certificate of the result. Section 13 empowers certain officers of a local authority to procure samples by purchase. If the officer suspects the sample to have been sold contrary to the provisions of the Act he "shall submit the same" for analysis by an analyst under the Act who is to give a certificate to such officer specifying the result. Section 14 provides that the person purchasing any article "with the in-
"tention of submitting the same for analysis" must notify the seller of such intention and divide the article into three parts. Section 17 makes it an offence to refuse to sell to an officer for analysis. Section 18 provides for the form of certificate to be used by a public analyst and section 19 directs all analysts appointed under the Act to make quarterly reports. Section 20 deals with proceedings against offenders. I shall refer to it in more detail later. Section 21 makes the certificate of the analyst prima facie evidence of what it states. Of the other provisions of this statute I need only mention now section 22. Under it, as amended by section 21 of the Sale of Food and Drugs Act, 1899, the Court dealing with a complaint under the Act of 1875 must, on the request of either party, cause an article of food or drug to be sent to the Commissioners of Inland Revenue for analysis.

With this brief description of the statute, I come to

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the three cases on its interpretation which were so closely canvassed in the course of the argument. *The Enniskillen Guardians v. Hilliard* (1) was decided by the Exchequer Division in Ireland in 1884. The Guardians had instituted proceedings under section 6 of the Act as purchasers for consumption. They obtained an analyst's certificate under section 12 and produced it as part of their proofs. But they had not complied with the procedure laid down by section 14 in respect of purchases made with the intention of obtaining an analysis. The Court held that section 14 did not apply as the Guardians had not purchased for the purpose of obtaining an analysis. The point now under discussion was not, therefore, really in issue but the judgments contain passages which certainly support the views advanced on behalf of the present defendant. Dowse B. says at p. 223 : " Section 10 gives power to " appoint a public analyst. This section, taken in " connexion with sections 11, 12 and 13, seems to con- " template that no prosecution can be instituted unless " the article has been analysed by the proper person " appointed to do so." This view appears to have been shared by Andrews J. who, after a reference to section 20, says at p. 228 : " A purchaser of an adulterated " article who has had it analysed by an official analyst, " from whose certificate it appears that an offence " against the Act has been committed, is enabled to " take the prescribed proceedings against the seller." *Buckler v. Wilson* (2) was decided by a Queen's Bench Court in England consisting of Lord Russell of Killowen C.J., Pollock B. and Wright J. The case arose out of a prosecution under the Margarine Act, 1887, and one of the questions submitted by the justices was whether section 14 of the Act of 1875 " was applicable, the " article not having been purchased with the intention " of submitting the same to analysis." In the course of a considered judgment (in which the other members of the Court concurred) the Lord Chief Justice concludes that this question should be answered in the negative, and he adds, at p. 90 : " The chief difficulty " is raised by ss. 20 and 21 of the Sale of Food and

(1) (1884) 14 L.R. Ir. 214. (2) [1896] 1 Q.B. 83.

"Drugs Act, 1875, which, dealing generally with pro-
"ceedings under the Act, certainly at first sight seem
"to imply that the formalities prescribed by s. 14 have
"taken place. It seems to me, however, that the effect
"of s. 21 is merely to make the production of a certi-
"ficate of an analysis under s. 14 of itself sufficient
"evidence of the facts therein stated. There is nothing
"in the Act to prevent the proof of an offence by other
"satisfactory evidence—nor is it necessary that the
"purchaser should obtain the certificate of the 'public
"analyst,' except where he purchases 'with an inten-
"tion' of submitting to analysis. Section 12 merely
"gives him *the right* on certain payments to claim an
"analysis from the public analyst." In *R. (Barry) v. Mahony* (1), the point now before us was decided by the Irish King's Bench, the Court consisting of Gibson, Boyd and Kenny, JJ. A lady, who had been successfully prosecuted for selling adulterated milk which she had purchased innocently, prosecuted the wholesale dealer who had supplied her for an offence under section 6. She put in evidence the analyst's certificate which had been used on her own prosecution but did not produce a certificate of any analysis made on her behalf. A conviction having been obtained, it was held that it could not be sustained on the ground that the prosecutor had procured no analysis and that the obtaining and production of an analyst's certificate by the person bringing the proceedings was a condition precedent to prosecution. In the course of his judgment Gibson J. refers with approval to the judgments in the *Enniskillen Guardians v. Hilliard* (2), saying, at p. 495:
"I agree with the opinions of Dowse B. and Andrews
"J. as to the 12th, 20th, and 21st sections. The statute
"pivots on analysis by a prescribed officer. Sections
"10, 12, 18, 19, 20 and 21, all indicate that the analyst's
"certificate is an indispensable requisite in a purchaser
"prosecution as well as in an official prosecution.
"Section 20, under the heading 'Proceedings against
"offenders,' relates to prosecutions of every class; and
"'the person causing the analysis to be made' includes
"an ordinary purchaser. If such purchaser could

(1) [1909] 2 I.R. 490. (2) (1884) 14 L.R. Ir. 214.

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"treat section 12 as optional, and rely on oral evidence; "or, having obtained a certificate, could suppress or "discard it, the seller would have no protection from "a certificate by a public official. The certificate "under section 12 must be in the form prescribed by "section 18, and it is evidence for the purchaser under "section 21, as the *Enniskillen Case* (1) decides. Section 20 shows that the certificate so made evidence is "preappointed necessary proof which the purchaser "cannot omit, or, having obtained it, throw over. The "dictum in *Buckler's Case* (2) was unnecessary for the "decision, as there was a good certificate under section "12, and the express opinions of the Irish Judges to the "contrary were unfortunately overlooked." Kenny J. agrees and, after considering the effect of section 20, proceeds, at p. 497: "The prosecutor gave no evidence "of having caused an analysis to be made before com-"mencing the prosecution—much less of having ob-"tained a certificate. How then can she maintain a "summary proceeding for adulteration under the 6th "section? The right is given to a person who, having "caused an analysis to be made, has, before putting the "law in motion, obtained a certificate of analysis show-"ing that an offence against someone of the provisions "of the Act had been committed."

If *Mahony's Case* (3) is binding upon this Court no more need be said for it is directly in point. I am of opinion, however, that we are not bound by it and that this Court is free to reach its own conclusion on the matter. That accords with the decision of the Court of Appeal in *R.* (*Greenaway*) *v. Armagh Justices* (4), and, indeed, we were not asked by Mr. McCall, in the course of his careful argument on behalf of the defendant, to hold otherwise. Nevertheless, as a decision of the Irish King's Bench which settled the point in this country for many years before the passing of the Government of Ireland Act, 1920, *Mahony's Case* (3) is entitled to and must receive the most respectful consideration. For my own part I am not prepared to differ from a judgment of that Court in a case of such

(1) (1884) 14 L.R. Ir. 214.
(2) [1896] 1 Q.B. 83.
(3) [1909] 2 I. R. 490.
(4) [1924] 2 I. R. 55.

standing concerning the criminal law unless satisfied that it was clearly wrong. The law of any healthy society cannot be entirely certain, but the less uncertainty there is about its penal provisions the better.

No doubt the Act of 1875, read as a whole, goes to show that the Legislature attached much importance to skilled analysis as a means of proving adulteration. But, apart from section 20, I can find no provision of general applicability which would render an ordinary purchaser who has not obtained an analysis incompetent as a prosecutor in summary proceedings for the enforcement of section 6. Sections 13 and 14 make it quite clear that a *test* purchase cannot be made the subject of proceedings under the Act without analysis, but the nature of the evil to which the Act was directed does not seem to demand that this requirement should extend to purchases for use. As was pointed out during the argument, a purchaser for use may, just because he is in that category, unwittingly make analysis impossible and suffer not less but more on that account. I find it hard to see why the purchaser of, say, a tainted meal who has suffered food poisoning by swallowing his purchase should not have recourse to proceedings under section 6 unless the Legislature has denied him that right. And that, in my opinion, depends entirely on what is the true construction of section 20.

This section consists of three distinct paragraphs. The last of these relates to the mitigation of penalties and is immaterial. The second provides for the recovery of all penalties imposed by the Act. In Ireland, outside the Dublin area, this is to be in accordance with the provisions of the Petty Sessions (Ireland) Act, 1851—a statute which, it may be observed, confers jurisdiction by reference to the place where the offence was committed or the defendant resides. In itself this paragraph does not appear to affect the question. It is the first paragraph which raises the difficulty. It reads:

> "When the analyst having analysed any article "shall have given his certificate of the result, from "which it may appear that an offence against some "one of the provisions of this Act has been com-

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"mitted, the person causing the analysis to be made "may take proceedings for the recovery of the "penalty herein imposed for such offence, before "any justices in petty sessions assembled having "jurisdiction in the place where the article or drug "sold was actually delivered to the purchaser, in "a summary manner."

Now I think it is plain enough that this paragraph does not discriminate between one kind of purchaser and another and, if it ended with the words "for such "offence," I should have little difficulty in construing the words "the person causing the analysis to be made "may take proceedings" as meaning that no person else, whether a purchaser for consumption or not, could take such proceedings. It is the wording after "for "such offence" that gives ground for debate. This concluding portion of the paragraph confers jurisdiction with reference to the place of actual delivery. That may not be the place of sale and, therefore, may be neither the place of the commission of the offence nor the place of residence of the defendant. The paragraph accordingly, provides for a *special* jurisdiction which is not conferred by the application of the Act of 1851. Is it, then, to be regarded merely as permissive in the sense of enabling a particular class—those who have procured a satisfactory certificate of analysis—to bring summary proceedings in the district of delivery? Or is it to be construed more widely as meaning that only those who have procured the certificate of analysis referred to can take summary proceedings? Whatever be the correct view it is, as a matter of common sense, evident that the paragraph cannot refer to offences—such as a breach of section 17—which by their nature are not concerned with anything capable of analysis. It must be confined to those offences with which the Act is principally concerned and which savour of adulteration or some kindred malpractice. This necessary curtailment of its scope, however, does little to determine the true construction of the paragraph which, parse it as one may, exhibits the difficulties that flow from loose drafting rather than a complex subject matter. In *Buckler's Case* (1) the Court seems to have

(1) [1896] 1 Q.B. 83.

taken the view that the paragraph was but permissive. Lord Russell points out, at p. 88, that " It should first " of all be noticed that the section merely says ' *may* " take proceedings.' . . ." *Mahony's Case* (1) rejects that view and adopts the alternative interpretation. Considered by itself the paragraph affords no satisfactory indication as to which view should prevail.

In these circumstances it is, I think, legitimate to look back to the enactments which the Act of 1875 replaced and which, though repealed, are *in pari materia* with it. See the observations of Lord Mansfield in *R. v. Loxdale* (2). When this is done one finds that the Acts of 1860 and 1872 are framed on lines very similar to those of the Act of 1875. Their provisions are not so ample and they do not draw the net so closely. But they have much in common. Each makes the sale of adulterated articles an offence, each provides for the appointment of public analysts by local authorities, and each entitles any purchaser to have his purchase analysed by an analyst so appointed. And one also finds in each of these earlier statutes a clear indication that analysis by a public analyst had to precede the hearing of a complaint thereunder. Thus section 3 of the Act of 1860 provides (in quite general terms) that the purchaser shall prove that the seller had not only notice of the purchaser's intention to have the article in question analysed but an opportunity of accompanying the purchaser to the analyst. The Act of 1872 (which provided for the first time for enforcement by officers on behalf of local authorities) is even more specific, section 8 thereof being as follows :—

" On the hearing by the justices, sheriff substitute, " magistrate, or divisional justice of any complaint " under this Act in any district, county, city, or " borough wherein analysts shall have been appointed " under this Act, the purchaser, or inspector of " nuisances, or the inspector of weights and mea- " sures, or the inspector of markets, as the case may " be, shall prove to the satisfaction of such justices, " sheriff substitute, magistrate, or divisional justice " that the article of food or drink or drugs alleged to

(1) [1909] 2 I. R. 490. (2) (1758) 1 Burr. 445, 447.

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"be adulterated was delivered to the analysts in the "same condition as regards its purity or impurity as "it was when received from the seller."

Now whatever may be said of the policy which these provisions manifest, I cannot but feel that, had the Legislature intended only three years after passing the enactment just quoted to modify that policy by relieving a purchaser for use or consumption of the burden of proving an analysis, the change would have been accomplished in terms far more definite and apt for the purpose than any that can be found in the Act of 1875. As it stands that statute and its subsequent amendments certainly do not contain any plain and unambiguous indication that such a change was intended. On the contrary there is, I think, at least one provision which shows fairly clearly that such a change was not within the contemplation of the Legislature at all. I refer to that part of section 33 which provides for the recovery of penalties in Scotland. It is the portion of paragraph 9 which reads :—

"Every such penalty may be recovered at the "instance of the procurator fiscal of the jurisdiction, "or of the person who caused the analysis to be "made from which it appeared that an offence had "been committed against some one of the provisions "of this Act."

In Scotland, therefore, a purchaser of any sort, whether for test or use, could not himself initiate summary proceedings under the Act of 1875 unless he first procured an analysis favourable to his case. It is true that the need for analysis is not expressly mentioned in relation to a prosecution at the instance of the procurator fiscal. But I find it hard to believe that the statute contemplated any such difference in the burden of proof according to whether the prosecution was public or private in nature, and all the more so as section 13 makes analysis compulsory in cases of official enforcement.

I consider, then, that the Act of 1875 intended to continue in regard to Scotland the policy as to analysis manifested by section 8 of the Act of 1872. And as I can see no ground anywhere for thinking that the

Legislature meant or had cause to make any difference in this respect between Scotland and the rest of the United Kingdom, I conclude that the interpretation of the first paragraph of section 20 should accord with this view.

For these reasons I am of opinion that the construction adopted in *Mahony's Case* (1) was the true construction and that the learned Resident Magistrate was right in law in preferring that decision. The question he submits should be answered in the affirmative.

Appeal dismissed.

Solicitor for the appellants, The Ministry of Agriculture : *Chief Crown Solicitor.*

Solicitor for the respondent, Robert James Turtle : *Samuel Cumming.*

(1) [1909] 2 I. R. 490.

J. McC.

Ch. D.
1944.

Nov. 22.

1945.

Mar. 6;
Dec. 14.

IN RE DUNVILLE.
BROWNRIGG AND ANOTHER v. DUNVILLE AND OTHERS (1).

Will—Construction—Sums to be set aside to produce "£500 per year "free of taxes" and "£1,000 per year free of tax"—Whether annuities or income—Investment of funds—Basis of calculation —Recovery by trustees of overpayments to beneficiaries—Direction to pay "free of taxes" referable to United Kingdom taxes only.

A testator gave his residuary estate to trustees in trust for J.D. for life and thereafter for such of the children or remoter issue of J.D. as J.D. should by deed or will appoint. J.D. by his will in exercise of the power directed the trustees to set aside sums of money sufficient (1) "to produce £500 per year free of taxes and "pay the same by quarterly instalments" to W.D., and after the death of W.D. to hold "the capital and interest" for R.D. absolutely; (2) "to produce £500 per year free of taxes and pay the "same by quarterly instalments" to M.R., and after the death of M.R. to hold "the capital and interest" for R.D. absolutely, and he directed that during the minority of M.R. the "income" was to be paid to her guardian; (3) to "produce £1,000 per year free of "tax" payable to V.D. for the benefit and maintenance of U.D., and after the death of V.D. the trustees were to "pay whatever portion "of the income" they thought necessary for the benefit of U.D., and after the death of U.D. to hold "the capital and unexpended "income (if any)" for R.D. absolutely.

The trustees did not set aside sums of money as directed by the appointor, but had paid the clear yearly sums of £500 each to W.D. and M.R., and had paid the clear yearly sum of £1,000 to V.D. until her death, and thereafter had paid such sums as they considered necessary for the benefit of U.D.

W.D. had at all times since the death of J.D. been resident out of the United Kingdom, and it was contended in the case of his appointment that the expression "free of taxes" should be construed to mean free of such taxes as might be locally imposed in the place where he was for the time being residing.

Held, (1) that upon the true construction of the appointments contained in the will of J.D. the appointees were not entitled to annuities of the specified amounts free of tax at the rate in force in any year, but that it was the duty of the trustees to set aside and invest in long dated or irredeemable trustee investments sums sufficient to produce the amounts of £500, £500 and £1,000 free of

(1) In the Chancery Division before Black J.

United Kingdom income tax at the rate in force at J.D.'s death, and to pay the income of these sums to or for the benefit of the appointees during their lifetimes, and subject thereto to hold the capital in trust for R.D.

(2) that in calculating the sums so to be set aside the trustees should take into account any exemptions, rebates or other reliefs in respect of income tax to which the appointees would be entitled at the death of J.D., so that the yearly incomes of the appointees should be increased by £500, £500 and £1,000 respectively and no more.

The principle of *In re Pettit* [1922] 2 Ch. 765 applies unless the settlor has expressly or by necessary inference excluded its operation.

(3) that the trustees, having paid the appointees more than the appointees were entitled to receive, were entitled to recoup themselves the amounts which they had overpaid by deductions from future payments.

(4) that the expression "free of taxes" in a will made in the United Kingdom by a testator residing in the United Kingdom refers to taxes imposed by the law of the United Kingdom in the absence of a contrary intention.

In re Norbury [1939] Ch. 528 followed.

ADJOURNED SUMMONS.

Robert Grimshaw Dunville who died on the 17th August, 1910, devised and bequeathed the residue of his real and personal estate to his trustees upon trust for sale, and after providing for a life annuity for his wife and a protected life interest in his residuary estate for his son, John Dunville Dunville, he directed that after the death of his said son, John Dunville Dunville, his trustees should hold his residuary estate (subject to the said annuity) in trust for John Dunville Dunville's children or remoter issue in such manner as John Dunville Dunville should by Deed or Will or Codicil appoint.

John Dunville Dunville died on the 10th June, 1929. By his Will dated 23rd September, 1927, he made appointments in the following terms under the powers conferred upon him by his father Robert Grimshaw Dunville's will:

"I direct and appoint that the Trustees of the "said will shall set aside a sum of money sufficient "to produce £500 per year free of taxes and pay the "same by quarterly instalments to my son William "Gustavus Dunville during his life and after his

"death shall hold the capital and interest for my "son Robert Lambart Dunville absolutely.

"I direct and appoint that the said Trustees shall "set aside a sum of money sufficient to produce £500 "per year free of taxes and pay the same by quarterly instalments to the daughter of my son Robert "Lambart Dunville (by his first marriage with "Phyllis Combe) during her life and after her death "I direct the said Trustees to hold the capital and "interest for my said son Robert Lambart Dunville "absolutely. I direct that during the minority of my "said grandchild the income to (*sic*) be paid to her "guardian.

"I direct and appoint that the said Trustees shall "set aside a sum that shall produce £1,000 per year "free of tax and pay the same to my wife Violet "Anne Blanche for the maintenance and benefit of "my daughter Una and after the death of my said "wife shall pay whatever portion of the income that "my Trustees may think necessary for the benefit "of my said daughter Una to whatever person may "have care of her and after the death of my daughter "shall hold the capital and unexpended income (if "any) in trust for my said son Robert Lambart "Dunville absolutely.

"Subject to the above provisions I direct and "appoint that the Trustees of the Will of the said "Robert Grimshaw Dunville shall hold the remainder of the estate of the said Robert Grimshaw "Dunville in trust for my said son Robert Lambart "Dunville absolutely."

Robert Lambart Dunville died on the 10th January, 1931.

This summons was taken out by the trustees of the Will of Robert Grimshaw Dunville to have determined, *inter alia*, the following questions :

(1) Whether the appointments in favour of William Gustavus Dunville, Mrs. Maureen Robertson, and Una Dunville made by the Will of John Dunville Dunville were appointments of—

(*a*) Annuities of £500, £500 and £1,000 free of income tax at the rate from time to time prevailing, or

(*b*) Annuities of £500, £500 and £1,000 free of income tax at the rate prevailing at the date of death of John Dunville Dunville, or

(*c*) Incomes of funds producing the incomes of £500, £500 and £1,000 free of income tax at the standard rate prevailing at the date of death of John Dunville Dunville ; and

(2) If the answer to question 1 (*b*) be in the negative whether the plaintiffs are entitled to recoup themselves out of the future incomes of the funds for over-payments made in the past.

Patton for the plaintiffs.

Nicholson for William Gustavus Dunville.

Curran K.C. for Mrs. Maureen Robertson.

Phelan for Una Dunville.

Porter K.C. for the Trustees of the Will of Robert Lambart Dunville.

The arguments of counsel appear sufficiently in the judgment.

Cur. adv. vult.

BLACK J. [after stating the facts continued] : Now in the first place I think that there can be no doubt that the directions that the trustees of Robert Grimshaw Dunville's will shall set aside sums sufficient to produce "£500 per year free of taxes" and "£1,000 per " year free of tax " are legally effective to provide that the sums set aside should be sufficient to produce these amounts free of income tax (*In re Shrewsbury Estate Acts* (1)), and indeed this was conceded at the outset of the argument. It would even appear that these phrases would be sufficient to direct that the sums set aside should be such as would produce these amounts free of surtax as well as income tax (*re Reckitt* (2)), but I understand that this question does not arise in

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(1) [1924] 1 Ch. 315. (2) [1932] 2 Ch. 144.

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the present case. The rate of income tax however varies from time to time and a sum sufficient to produce an income of £500 or £1,000 free of tax at the rate in force at John D. Dunville's death might well be insufficient to produce such an income free of tax at the rates in force in years subsequent to his death. What were the trustees to do in such circumstances ? Were they to attempt to speculate regarding the future and to determine how great a sum it would be necessary to set aside to cover all future possibilities in regard to tax ? This would indeed be a difficult task even if only income tax was to be considered. And it would be not merely a difficult, but almost an impossible task, if (as apparently may be the case) the words used in John D. Dunville's will are to be construed as meaning that the trustees were to set aside sufficient sums to produce the specified yearly amounts free of surtax as well as income tax. Quite conceivably one of the appointees might ten or twenty years after John D. Dunville's death have acquired great wealth so that a very large gross addition to his or her then income would be needed in order to provide a net addition of £500 or £1,000 a year free of both income tax and surtax. It would appear unlikely that a testator would intend that trustees should have to embark on such a difficult or impossible task. At any rate, in the absence of a clear direction in the will, the Courts will not require them to do so. Where trustees are simply directed to set apart a sum sufficient to produce a certain net amount after payment of tax it is held that the sum to be set aside must be calculated on the basis of the rate of tax in force at the time when it becomes the duty of the trustees to set the sum apart (*In re Williams* (1) : *In re Powell* (2)). In the present case, therefore, the sums to be set aside fell to be computed on the basis of the rate of income tax in force at the date of John D. Dunville's death. Moreover it was not only the duty of the trustees to set apart such sums as when invested in proper investments would produce the net annual amounts specified in the appointments contained in John D. Dunville's will after deduction of tax at the

(1) [1936] Ch. 509. (2) [1945] Ch. 69.

rate existing at the time of his death, but it was also, I think, their clear duty to select investments the income from which, so far as could be reasonably foreseen, would be maintained throughout the lifetimes of the appointees. Their proper course in regard to the investment of the sums set aside was to invest these sums in long dated or irredeemable securities so as to obviate, as far as they could, any possibility of a decrease of income during the lives of the appointees. It would in my view have been wrong of them to invest these sums in a security such as the 5 per cent. War Loan which was obviously subject to a risk of redemption with consequent probable loss of income. It is stated by the trustees of Robert Grimshaw Dunville's will that they have not yet in fact set aside any sums in pursuance of the directions contained in John D. Dunville's will but have paid out of the general income of Robert Grimshaw Dunville's estate the yearly amounts which they considered were payable to the appointees under the appointments in John Dunville Dunville's will. The duty of the trustees in my opinion now is to set apart, and invest in long dated or irredeemable trustee investments, sums sufficient, when so invested, to produce the net annual amounts specified in those appointments calculated at the rate of income tax in force at the date of John D. Dunville's death.

Since the date of John D. Dunville's death various increases have taken place in the standard rate of income tax so that an investment which would have been sufficient to produce an income of £500 or £1,000 free of tax at the rate in force at John Dunville Dunville's death would not have produced an income of £500 or £1,000 free of tax in subsequent years when higher rates of income tax were in force. Assuming sums to have been set apart on the basis which I have held to be proper, i.e., on the basis of producing incomes of £500 or £1,000 free of tax at the rate existing at John Dunville Dunville's death, what would be the rights of the appointees in years when a higher rate of tax was in force? Would they be entitled to claim to be paid clear net sums of £500 or £1,000 free of tax as the case

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might be, even though the income of the investments was not sufficient to provide for the payment of these net sums free of tax, or would they have to be content with the actual income of the investments even though in those later years that actual income fell short of providing £500 or £1,000 free of tax at the then current rate? This depends upon whether on the true construction of John Dunville Dunville's will it is to be held that his intention was that the appointees should be paid *annuities* of the specified amounts free of tax, so that if the income of the funds set aside was insufficient to pay the specified amounts free of income tax at the rate in force in any year the appointees would be entitled to require that resort should be had to capital in order to make up the deficiency, or whether on the other hand it is to be held that under the terms of the appointments all that the appointees are entitled to is to receive the income of the funds directed to be set apart. As Lord Cranworth says in *Baker v. Baker* (1), at p. 628: "In all these cases arising upon the construction of wills, the real question is, whether that "which is given is an annuity, or is given as the interest "of a fund; and when that question is to be considered, "what you must look to is this, whether the language "of the testator imports that a sum, at all events, is "annually to be paid out of his general estate, or only "the interest, or portion of the interest, of a capital "sum which is to be set apart. Now in deciding that "question, it is obvious that all we have to look to is "the language of the particular will, and to ascertain "what is the true interpretation of the language there "employed."

I do not propose to review the numerous reported cases in which this problem has been discussed. The principle to be applied is quite clear. The difficulty is in its application to the wording of the particular will. In reading the cases one cannot help being struck by the remarkable differences of judicial opinion which have manifested themselves in regard to the construction of individual wills. A good example is the recent case of *In re Cutlar* (2), in which two judges held that

(1) (1858) 6 H.L.C. 616. (2) [1939] I.R. 600.

on the true construction of the will the beneficiary was entitled to payment of an annuity, and two other judges held that she was only entitled to receive the income of the invested fund. The case generally referred to as the leading case in which it was held that all that the beneficiary for life was entitled to was the income of the fund directed to be set apart and invested is *Baker v. Baker* (1). To the same effect are *Tarbottom v. Earle* (2), and *Mitchell v. Wilton* (3). The cases usually quoted as illustrating wills under which it was held that the beneficiary was entitled to an annuity of a fixed amount so that the capital of the invested fund (or the residuary estate) could be resorted to in order to make up any deficiency in income are *May v. Bennett* (4), *Wright v. Callender* (5), and *Carmichael v. Gee* (6).

In support of the contention that the appointees under John D. Dunville's will are entitled to tax free *annuities* of the specified amounts, strong reliance is placed upon the actual wording of the appointments. In each appointment the trustees are directed to set aside sums of money sufficient to produce £500 (or £1,000) per year free of tax and pay *the same* to (or for the benefit of) the appointees. It is urged that the words " the same " must in each case refer to the immediate antecedent, viz. the £500 (or £1,000) per year free of tax and that accordingly the duty of the trustees is to pay these amounts clear and free of tax each year to the appointees irrespective of how the rates of tax may vary from year to year. On the other hand it is contended that if one reads the appointments as a whole it becomes apparent that what the testator really is doing is that he is directing the setting apart of three separate funds and the payment of the income of those funds to (or for the benefit of) the appointees during their lives. It is pointed out that the frame and the lay out of the appointments much more closely resembles the settlement of three separate funds under which the income is to be paid to (or for the benefit of)

(1) [1858] 6 H.L.C. 616.
(2) (1863) 11 W.R. 680.
(3) (1875) L.R. 20 Eq. 269.
(4) (1826) 1 Russ. 370.
(5) (1852) 2 De G. M. & G. 652.
(6) (1880) 5 App. Cas. 588.

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a tenant for life and the capital is to be held upon trust for a remainderman after the death of the life tenant. It is said that in each of the three appointments the testator has in mind a distinction between capital and income. In the appointment in favour of Mrs. Maureen Robertson (the lady described in John D. Dunville's will as the daughter of his son Robert Lambart Dunville) the testator directs that during her minority the *income* is to be paid to her guardian. In the appointment in favour of the testator's daughter Una, the trustees are directed after the death of the testator's wife to pay whatever portion of the *income* that they may think necessary for the benefit of his daughter Una to whatever person may have care of her. And in the case of all three appointments the testator directs that after the death of the person to whom the life interest is appointed the trustees shall hold the *capital* and interest for Robert Lambart Dunville absolutely. Accordingly it is argued that the true effect of the will is to direct that three separate funds be set apart from the corpus of the estate over which John D. Dunville had the power of appointment, that the income of those funds be paid to (or for the benefit of) the three named appointees, and that subject thereto the capital of the three funds be held upon trust for Robert Lambart Dunville absolutely. No doubt the remainderman in the case of each fund, Robert Lambart Dunville, is the same person to whom the residue of Robert Grimshaw Dunville's estate is appointed by John D. Dunville's will. But this was also the position in *Baker v. Baker* (1). In that case the testator directed his trustee to raise out of his residuary estate such sum as when invested the dividends and interest thereof should realise the clear annual income of £200 and to pay such dividends interest or annual income to his wife during life or widowhood. After his wife's death or remarriage the trustee was to stand possessed of the investments for four named persons and the residue of the testator's estate after raising the money to constitute the invested fund was to be held in trust for the same four persons. And it is to be observed that it is

(1) (1858) 6 H.L.C. 616.

by quite separate appointments that John D. Dunville directs that the capital of such fund is to be held for Robert Lambart Dunville after the death of the person to whom the life interest (whatever precisely it may be) is appointed, and that it is by another quite separate and distinct appointment that the trustees of Robert Grimshaw Dunville's will are directed to hold the remainder of the estate in trust for Robert Lambart Dunville. The fact that these appointments are made quite separately is a point in which John D. Dunville's will differs from the will considered in *Carmichael v. Gee* (1). In that case some reliance was placed on the fact that after the death of the testator's wife the fund set apart to produce the annuity in her favour was not merely given to the same persons as the residue but was given (to use the expression employed by Lord Selborne at p. 596) *uno flatu* with the residue as indicating that the testator had not intended to create a separate specific fund, separate and divorced from the general residue of his estate.

Again, attention is called to the fact that the sums to be paid to the named appointees during their lives under the appointments contained in John D. Dunville's will are not spoken of in the will as "annuities." The justification for calling attention to this point is that in a number of decided cases—*Carmichael v. Gee* (1) itself is an example—the Court, in seeking the true construction of the will, attached importance to the fact that the testator himself had described the provision which he had made as an "annuity." No such phrase is used in John D. Dunville's will, and it is suggested that the absence of any such expression entirely accords with the view that the testator was not considering the creation of annuities but was only dealing in the first place with the income and then ultimately with the capital of three funds which he had directed to be set apart.

I think, too, I should mention another consideration which is urged as pointing in the same direction. Assuming on the authority of *Re Reckitt* (2), that the words "free of taxes" which are used in the appoint-

(1) (1880) 5 App. Cas. 588. (2) [1932] 2 Ch. 144.

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ments, mean free of surtax as well as income tax, then if the appointed sums are to be regarded as annuities a substantial increase in the income of one of the appointees from other sources might necessitate such a large annual payment to free the annuity from surtax as would involve a risk of the exhaustion during the lifetime of the appointee of a sum set apart in accordance with the principle laid down in *In re Williams* (1), and *In re Powell* (2). It is said that the Court should be slow to attribute to the appointor an intention which might lead to such a result. And it is contended that if there are two possible constructions, one leading to a difficult result and the other to something workable, the latter ought to be preferred (*In re Wedgwood* (3). *In re Fenwick* (4), *In re Duke of Sutherland* (5)).

The mode which John D. Dunville adopted of making provision for the appointees whom he wished to benefit was to direct the setting apart of sums which should produce £500, £500 and £1,000 a year, free of tax. And I think it is tolerably clear not only from the form of the appointments but from the testator's use of the words income and capital that he considered that the income from the sums set apart would be sufficient to provide these annual amounts free of tax for the appointees and that the capital of the sums set apart would remain intact and be ultimately held upon trust for Robert Lambart Dunville. He does not appear to have directed his mind at all to the question of what was to be done if the rate of taxation increased so that the income of the funds originally set aside would not be sufficient to provide the specified annual amounts, free of tax, at the new rates. And it is idle to speculate as to what would have been his decision if his attention had been directed to the point. Our task is to endeavour to construe his will as it stands and to decide upon its wording what is the effect of the provisions which he has in fact made. I have not found the problem easy to solve. If the words "the same" are parsed strictly they would apparently mean that the

(1) [1936] Ch. 509.
(2) [1945] Ch. 69.
(3) [1921] 1 Ch. 601.
(4) [1922] 2 Ch. 775.
(5) [1922] 2 Ch. 782.

trustees were to pay the specified amounts free of tax to the appointees even though the rate of taxation increased and the income from the funds directed to be set aside fell short of being sufficient to provide for such payments. On the other hand when trustees are directed to set aside a sum sufficient to produce a certain income and to pay the same to a beneficiary, I am not sure that the testator does not really mean that what they are to pay is the income of the sum set aside. *In re Williams* (1), the testator had directed his trustees to set aside sufficient to provide an income of £1,000 a year (without deduction of income tax) and to pay *such income* to his wife during her life. No suggestion was made that it would be legitimate to resort to the capital of the sum set aside in order to make up the income to £1,000 a year free of tax if the rate of tax increased ; and the language of one at least of the members of the Court of Appeal seems to negative such a view. See, too, the wording considered by Hall V.C. in *Mitchell v. Wilton* (2).

In construing a will we must not confine our attention to one particular expression but must endeavour to collect the testator's intention from the instrument as a whole. In *Evans v. Ball* (3), Lord Selborne lays down what he describes as the universal principle adopted by all the courts of this country in the construction of wills. At p. 167, he says : " You look to the whole " will, and endeavour from every part of it to ascertain " the intention, and if in some parts the form of ex- " pression may point in a particular direction, yet there " may be in the rest of the will, and in the general " scheme, as is sometimes said, or in its particular " provisions taken together, sufficient indication that " the first impression from the literal construction of a "" particular portion of it is not to be trusted ; and that " the true intention was that which the Court can carry " out by supplementing the actual words ; that is to " say, by accomplishing the general purpose at all " events, and by making the particular words subordin- " ate to that general purpose." He then goes on to

(1) [1936] 1 Ch. 509.
(2) (1875) L.R. 20 Eq. 269.
(3) (1882) 47 L.T. 165.

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say that the principle is general though it is one always applied with great discrimination and caution. I need not encumber this judgment with a catalogue of examples of the application of the principle. A good instance is *In re Johnson* (1). In that case a testator had devised and bequeathed his property to trustees in terms which on a strict grammatical construction gave them the option either of retaining it in the same state as at the time of his death or of selling and converting it into money. Astbury J. however held that the rest of the will which was in the usual form of a settlement of property directed to be sold and converted and which contained the ordinary power to postpone sale and conversion, was sufficient to indicate that the will should be construed as creating an imperative trust for sale.

As against these words "the same" in John D. Dunville's will—and personally I am doubtful whether if they stood alone they ought to be construed as meaning the £500 (or £1,000) a year free of taxes, or as meaning the amounts produced by the invested funds —all the other indications in the will appear to be in favour of construing the appointments as amounting to directions that the named appointees were to be entitled only to the income of the funds and that the capital was to be eventually held after the appointees' deaths in trust for Robert Lambart Dunville. The strong element is the frame and actual structure of the appointments. They are not in the form in which one would expect to find appointments of annuities ; they do not take the form of appointments of annuities and the setting aside of funds to secure the annuities ; they are obviously framed from an ordinary precedent of the setting apart of a fund and the settlement of that fund upon trust to pay the income to a tenant for life and subject thereto to hold the capital in trust for a remainderman. The use of the words "the income" in the appointments in favour of Mrs. Maureen Robertson and Una Dunville indicates that what was to be available for the appointees during their lives was the income of a fund ; and the fact that in the case of two of the

(1) [1915] 1 Ch. 435.

funds the capital and interest is to be held in trust for Robert Lambart Dunville after the death of the appointee for life and that in the case of the third fund (Una Dunville's) the capital and unexpended income (if any) is to be held after her death in trust for Robert Lambart Dunville is, I think, at least some indication that the capital of the funds is to be preserved intact for the remainderman. Reading the appointments as a whole, and endeavouring to construe them in the light of the principle laid down by Lord Selborne in *Evans v. Ball* (1), albeit remembering Lord Selborne's warning to apply the principle with due discrimination and caution, I have come to the conclusion that I ought to hold that upon the true construction of John D. Dunville's will the effect of the appointment is that the trustees are to set aside and invest sums sufficient to produce the amounts of £500, £500 and £1,000, free of taxes, at the rate of tax in force at John D. Dunville's death, and to pay the income of those sums to (or for the benefit of) the named appointees during their lifetimes and subject thereto to hold the capital of the sums in trust for Robert Lambert Dunville.

If this is the true construction of John D. Dunville's will the next question which arises is, how are the sums to be measured which the trustees of Robert Grimshaw Dunville's will are to set apart ?

The two possible alternatives obviously are that on the one hand the trustees should set apart sums sufficient to produce the incomes of £500, £500 and £1,000 free of tax at the standard rate of tax in force at John D. Dunville's death, or that on the other hand they should set apart sums sufficient to produce incomes of those amounts free of such tax as the individual appointees would be liable to pay in respect of such additions to their incomes at John D. Dunville's death, in other words sufficient to produce net additions of £500, £500 and £1,000 to the appointees' actual incomes. In my opinion the latter is the correct view.

Unfortunately no assistance towards the solution of this problem is to be obtained from either of the two

(1) (1882) 47 L.T. 165.

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cases of *In re Williams* (1) and *In re Powell* (2), to which I have already referred. *In re Williams* (1) the question was apparently not discussed. *In re Powell* (2) the yearly sum free of tax which was to be produced by the investment was not directed by the will to be paid to a named individual whose actual liability to tax could be ascertained. It was to be applied towards the stipend of an assistant priest for a certain parish. Accordingly, the only rate of tax to which Vaisey J. could have regard was the ordinary current rate of tax.

I cannot think, however, that in the present case the testator in directing that the sums set apart should be sufficient to produce £500, £500 and £1,000 a year free of taxes intended the formula to be impersonal, if I may borrow a convenient expression used in argument in the recent case of *Re Tatham* (3). If sufficient was set aside to produce £500, £500 and £1,000 a year free of tax at the standard rate, then the result would be that if one of the appointees was entitled to any relief or allowances he or she would in fact receive at the outset an addition to his or her net income of something more than £500 or £1,000 a year. I do not think that the testator intended this. I do not think he was speaking impersonally. I think he had in mind the actual individual appointees, and I think his intention was that the sum directed to be set aside in each case should be sufficient to produce a net addition of the specified amount to the particular individual appointee's income. In *Re Pettit* (4), a testator had directed his trustees to pay an annuity of £1,000 free of income tax to his wife for life. It was held by Romer J. that the testator's object was to provide for an addition to the annuitant's income of a net sum of £1,000 and no more after discharging liability for income tax and that accordingly the annuitant was bound to give credit for any reliefs and allowances the retention of which would have increased the benefit received by her from the annuity to more than £1,000 net.

(1) [1936] Ch. 509.
(2) [1945] Ch. 69.
(3) [1945] Ch. 34.
(4) [1922] 2 Ch. 765.

In Re Pettit (1) has been discussed in a considerable number of subsequent cases. The principle which it laid down received the express approval of the English Court of Appeal in *Re Maclennan* (2). In that case Sir Wilfrid Greene, M.R. says (at p. 759) that Romer J.'s reasoning in *Re Pettit* (1) appears to him to be as satisfying as any reasoning can be. And in recent cases one finds judges freely referring to the rule in *Re Pettit* (1) (per Uthwatt J. in *Re Thomas* (3)) or to the principle of *Re Pettit* (per Romer J. in *Re Bates* (4)).

A question frequently debated in the subsequent cases is whether upon the true construction of the particular document under consideration the case falls within the principle of *Re Pettit* (1) or whether on the other hand the document is to be construed as directing that the gift is to be free of income tax at the full current rate. Instances where the case was held to fall under *In re Pettit* are the English cases of *In re Maclennan* (2); *In re Eves* (5) and *In re Tatham* (6), and the Scottish case of *Re Milne's Trustees* (7). Instances where it was held that on the true construction of the document the gift was to be free of income tax at the full current rate are the English case of *In re Jones* (8) and the Scottish cases of *Richmond's Trustees v. Richmond* (9) and *Rowan's Trustees v. Rowan* (10). The distinctions drawn in the cases are very fine and are not always easy to follow. It would appear, however, to be regarded as established that in the simple case of a gift to a named individual of an annuity of a specified amount free of income tax the annuitant must account for and give credit for all reliefs and allowances to which he is entitled. The principle of construction to be derived from the cases is set out by Evershed J. in the recent case of *In re Tatham* (6) in terms which I would wish most respectfully to quote as expressing my own view. After referring to a number of the authorities Evershed J. says (at p. 43): "As I under-

(1) [1922] 2 Ch. 765.
(2) [1939] 1 Ch. 750.
(3) [1945] 2 All E.R. 586.
(4) [1945] 2 All E. R. 688.
(5) [1939] Ch. 969.
(6) [1945] Ch. 34.
(7) [1936] S.C. 706.
(8) [1933] Ch. 842.
(9) [1935] S.C. 585.
(10) [1940] S.C. 30.

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"stand it, the reasoning underlying all these decisions "involves the result that, in formulae of the kind here "in question, there must be found, if the annuitant is "to be held not accountable in respect of reliefs and "other repayments, a limitation, by express words or "necessary inference, of the phrase 'income tax' "to 'income tax at the standard rate'; and that, in "the absence of express words, the necessary infer-"ence will not be lightly drawn." In this respect I think the same principle ought to be applied whether the direction is to pay an annuity of £1,000 free of tax to a named individual or whether it is to set aside a capital sum sufficient to provide an income of £1,000 free of tax and to pay that income to the named individual. I think that in both cases the natural inference to be drawn is that the testator is thinking of the position of the particular named individual and that what he has in mind is to provide for an increase of the named individual's income by a sum of £1,000 net after taking into consideration any reliefs or abatements to which the individual may be personally entitled. Accordingly, in calculating the sums to be set aside to produce the £500 per annum free of taxes for the testator's granddaughter and the £1,000 free of tax for the testator's daughter, I think the trustees should have regard to the rule in *Re Pettit* (2) and should set aside sums in the one case sufficient to produce a net increase of £500 a year to the granddaughter's income as at the death of John D. Dunville, taking into account any reliefs or abatements to which the granddaughter would be then entitled, and in the other case sufficient to produce a net increase of £1,000 a year to the daughter's income as at the death of John D. Dunville, taking into account any reliefs or abatements to which the daughter would then be entitled.

With regard to William Gustavus Dunville, it appears that he is and has at all times since the date of John D. Dunville's death been resident outside the United Kingdom. During the hearing it was stated that he was in Australia at the time of John D. Dunville's death and that he is now in Canada. It was suggested that, inas-

(1) [1922] 2 Ch. 765.

much as William Gustavus Dunville was residing abroad at the time of John D. Dunville's death, the direction in the latter's will that the trustees of Robert Grimshaw Dunville's will should set aside a sum of money sufficient to produce £500 a year free of taxes and pay the same to William Gustavus Dunville during his life should be construed as meaning that the amount to be set aside should be sufficient to provide £500 a year free of such taxes as would be locally imposed in respect thereof wherever William Gustavus Dunville might happen to be residing. I cannot accept this suggestion. In a will made in the United Kingdom by a testator residing in the United Kingdom such an expression as " free of taxes " must be taken as referring prima facie to United Kingdom taxation. (*In re Norbury* (1); *In re Frazer* (2). I do not think that in speaking of £500 a year free of taxes John D. Dunville had in mind that the £500 a year should be free of whatever taxes William Gustavus Dunville might be liable to pay under the laws of any Dominion or foreign country in which he might chance to be living at the time when John D. Dunville's will should take effect. Though apparently residing abroad at the date when John D. Dunville made his will, William Gustavus Dunville might presumably have returned to live in the United Kingdom at any time. In my opinion it would require more than the mere fact that the beneficiary happened to be residing abroad to induce the Court to hold that in a will such as this the testator by the simple phrase " free of taxes " meant free of any taxes other than United Kingdom taxes. Nor can I accept the alternative suggestion that the sum to be set aside in the case of William Gustavus Dunville should be sufficient to produce £500 a year clear of United Kingdom income tax at the full current rate of tax. By receiving the income derived from a sum set aside on this basis and availing himself of his rights under the Income Tax code as a person residing outside the United Kingdom, William Gustavus Dunville might well succeed in getting into pocket by way of income substantially more than the £500 net contemplated by

(1) [1939] Ch. 528. (2) [1941] Ch. 326.

Ch. D. 1945.

In re Dunville. Brownrigg and Another v. Dunville and Others.

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John D. Dunville. I do not think that the testator intended a sum to be set aside which would produce for William Gustavus Dunville an addition to his income of more than £500 net. I am of opinion that the duty of the trustees was to set aside a sum which would produce for William Gustavus Dunville at the time of John D. Dunville's death and in the circumstances then existing a net addition to his income of £500 a year free of any United Kingdom tax to which William Gustavus Dunville would then be liable after taking into account any exemptions, abatements or other reliefs to which William Gustavus Dunville might then be entitled, whether on the ground of residence outside the United Kingdom or otherwise.

This disposes of the main questions raised on the Summons. One subsidiary question remains. It appears that the trustees of Robert Grimshaw Dunville's will did not in fact set aside any sums in pursuance of the directions contained in John D. Dunville's will but have hitherto simply paid to William Gustavus Dunville and Mrs. Maureen Robertson clear yearly sums of £500 and that, until the death of John D. Dunville's widow, they paid her the clear yearly sum of £1,000 for the maintenance and benefit of Una Dunville, since which time they have expended on her maintenance varying yearly sums. If my view of the true construction of John D. Dunville's will is the correct one, then the trustees have been paying the appointees more than the appointees were legally entitled to receive, and the question now arises whether in making future payments to the appointees the trustees are entitled to recoup themselves for the amounts which they have overpaid in the past. I have no hesitation in holding that they are entitled to do so. In a case like the present of overpayments made through bona fide mistake by a trustee to a cestui que trust in the administration of a trust, the Court will ordinarily allow the rights of the parties to be adjusted by sanctioning the making by the trustee of the appropriate deduction from future payments (*In re Musgrave* (1), *In re Wooldridge* (2)). The case is quite different from *In re*

(1) [1916] 2 Ch. 417. (2) [1920] W.N. 78.

Hatch (1), which was relied upon in the argument. That case was not a case of overpayments by a trustee in the administration of a trust. It was a case of overpayments made by a debtor to a creditor; and it was held that the overpayments having been made under mistake of law they were neither recoverable as a debt nor could they be deducted from future payments.

Solicitor for the plaintiffs: *J. Dunville Coates.*

Solicitors for W. G. Dunville: *Johns, Elliott & Johns.*

Solicitors for Mrs. M. Robertson and Una Dunville: *L'Estrange & Brett.*

Solicitors for R. L. Dunville: *E. & R. D. Bates.*

M. V. P.

(1) [1919] 1 Ch. 351.

K.B.D.
(Matrimonial)
1945.

Dec. 12, 13, 14.

1946.

Jan. 24.

BACON v. BACON (1).

Divorce—Desertion—Tacit consent by petitioner to respondent's departure—Desertion "without reasonable excuse"—Onus of proof—Matrimonial Causes Act (Northern Ireland), 1939 (2 & 3 *Geo.* 6, *c.* 13), *sec.* 2 (*b*).

The petitioner and respondent intermarried in 1921. In 1929 the petitioner committed adultery with C, and in the next year gave birth to a child of whom C was the father. Thereafter the petitioner went to live at C's house where she was later joined by the respondent, and for six years the petitioner, the respondent and C lived together in the same house. In 1936 the respondent left the house and did not return. The petitioner did not protest at the respondent's departure, nor did she attempt to persuade him to remain or to return, and the Court found that the petitioner was a fully consenting party to the respondent's departure.

Held, that the respondent did not desert the petitioner.

A spouse who expressly or impliedly consents to the departure of the other spouse or who is not willing that the other spouse should remain in the matrimonial home cannot be held to have been deserted.

Held, further, that assuming there to have been an act of desertion the onus was on the petitioner to establish that the respondent had left her without reasonable excuse, and that she had failed to discharge this onus.

PETITION for divorce by a wife against her husband on the ground of desertion.

The facts sufficiently appear from the judgment.

G. B. Hanna for the petitioner.

There was no appearance for the respondent.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J. : In this case a wife seeks divorce from her husband on the ground of desertion which it is alleged commenced in April, 1936. She also asks that the Court should exercise its discretion in her favour. The respondent did not enter an Appearance ; and the only persons who gave evidence before me were the petitioner and a man named George

(1) In the King's Bench Division (Matrimonial) before Andrews L.C.J.

Courtney, with whom, it is admitted, the petitioner committed adultery on several occasions, and who on his own evidence was the father of a child to whom the petitioner gave birth on 12th January, 1930.

The marriage, which does not appear to have ever been a very happy one, was solemnised on the 9th February, 1921. Some years afterwards, when the petitioner and respondent were living together at 42 Cussick Street, Belfast, Courtney, who had had trouble with his own family, came to lodge with them; and in the year 1929, when the respondent went away for two days and nights on a short cycling tour, the petitioner, on her own admission and on the evidence also of Courtney, committed adultery with him. In attempted explanation, if not, indeed, justification of her conduct she said that she had doubt about her husband's faithfulness to her, and also that she thought he was not coming back. No attempt, however, was made to prove that he had been unfaithful, and in fact he did return after only two days' absence. In the summer of the same year—1929—the petitioner found that she was pregnant; and prior to the birth of the child she went away to the country with Courtney. After the child was born they came back to Belfast where Courtney took a house in Annalea Street; and, remarkable as it may appear, they were there joined by the respondent. Later Courtney took a house in Melrose Street and the respondent accompanied them; but the petitioner states that she did not occupy the same room or sleep with her husband since 1928.

The evidence which the petitioner gave on her direct examination in regard to the initial act of desertion was the most meagre that I have ever received in any case that has come before me. It consisted of the one sentence :—" In 1936 he said he was leaving." After her direct examination had closed, and as no one appeared on behalf of the respondent, I questioned her further on this and other points in her evidence. She then said :—" He left asking me for his Insurance " Policies with Burial Societies. I asked him where " he was going, and he said it was none of my business." That was the utmost I could elicit from her. She did

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not impress me as a witness who was anxious to tell me all that she knew. Neither did she convince me that all that she did say was true. If she really asked her husband where he was going, and if he made the reply which she attributed to him, why did she not tell this to her own solicitor or counsel? For it is inconceivable, if she did so inform them, that the incident which was the very foundation of her desertion claim should have been left where it was in her direct examination. I had further reason to doubt her testimony, or at any rate her candour, by the evidence which she gave in regard to her adultery. Her pregnancy, followed by the birth of the child in January, 1930, and Courtney's evidence, left her no alternative but to admit the adulterous act during her husband's two days' absence. She also admitted on her direct examination the commission of adultery "on one or "two other occasions." She followed this up by asserting that she did not commit adultery again before 1936 when her husband left. In reply to me she said later that she had had these relations with Courtney four or five times in all. The first occasion was in 1929; the next was a long time after the child was born, but it was before 1936; also there were other times since he (the respondent) went away in 1936. This contradictory evidence is not clarified for us by Courtney who said:—"We did not commit adultery "again (i.e., after 1929) before 1936"; following this up, when I called his attention to the petitioner's evidence, by saying:—"We may have committed it "before 1936". Courtney confirmed the petitioner's evidence in regard to the commission of adultery occasionally after 1936, but not, he asserted, since 1943 when the petition was issued. Having seen and heard both witnesses I have not the slightest doubt that for many years past, at any rate prior to her receiving legal advice in 1943, the petitioner committed adultery habitually with Courtney.

I revert, however, now to the petitioner's evidence in reference to desertion. It is more remarkable for what it does not contain than for what it does contain even in the expanded form which it assumed in reply to my

questions. No attempt was made to detail any of the circumstances which induced the respondent to say he was leaving. She does not appear to have even asked him why he was leaving or whether he was coming back. She uttered no word of protest, and made no attempt to influence him to change his mind, or even to discuss the matter or to delay his departure. Not a word of regret was expressed that he was going, for, in truth, regret there was none. She did not offer to accompany him, for she apparently not only preferred but was determined to remain with Courtney and their child. He asked her, she says, for his Insurance Policies, and it is not denied that she got them for him. She made no subsequent inquiry for him, and never endeavoured to procure his return. She never sought a maintenance order against him, for she must have known that in the circumstances she could not succeed. She had finished with him as soon as he was gone—indeed for a considerable time before he went—for she had other conflicting preoccupations. Such a parting in my opinion is not desertion. There is nothing that I am more satisfied of in the case than I am of this, that the petitioner was at least as anxious to get rid of the inconvenience to her which resulted from her husband living under the same roof as he was to go from a house where he should never have lived at all. I hold that not only had she no wish that he should remain, but that she was a fully consenting party to his departure.

In these circumstances is the petitioner entitled to the relief which she seeks ? In my opinion she is not. I do not propose to make a detailed examination of authorities which I have reviewed on several occasions, as, for example, in *Cairns v. Cairns* (1), and *Black v. Black* (2) ; but, having regard to Mr. Hanna's argument, and in particular to his reference to the judgment of Buckley L.J. in *Harriman v. Harriman* (3), I feel it right to reaffirm in the most explicit terms that the separation which is necessary to constitute desertion must be one which is not voluntarily assented or

(1) [1940] N.I. 183.
(2) [1943] N.I. 62.
(3) [1909] P. 123, 148.

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agreed to by the spouse who is alleging desertion. If the circumstances of the case establish an express consent, or if they warrant the inference of an implied or tacit consent, there can be no desertion. I do not suggest that it is necessary in order to establish desertion that the deserted party should have an active emotional desire that the other party should remain. The conduct of the deserting spouse may have been such as to destroy the last vestige of affection, and, therefore, the last trace of a desire for a continuance of the married state. It was this thought to which Buckley L.J. gave expression in *Harriman v. Harriman* (1), in his well-known dictum :—" Desertion " does not necessarily involve that the wife desires " her husband to remain with her. She may be " thankful that he has gone, but he may nevertheless " have deserted her." Langton J. commented upon this dictum in *Spence v. Spence* (2), referring to it as *obiter*, pointing out that in his opinion if the passage were excised the *ratio decidendi* of the judgment of Buckley L.J. would remain entirely untouched, and accepting it with a very definite limitation to its context.

In my opinion it is safer in such cases as the present to consider the underlying principles rather than actual decisions, or passages taken from the judgments in reported cases, which, divorced from their context and applied to a different state of facts, may be definitely misleading. It is fundamentally important to bear in mind that " consent ", " willingness " and " desire " are three quite different things, representing three different mental or emotional states. The first and, in my opinion, the overriding consideration to be determined when desertion is alleged is whether or not there was an express or implied agreement or *consent* to the separation. If there was, and if such agreement or consent was never subsequently revoked, it is an end of the case ; there can be no desertion *Macaskill v. Macaskill* (3). In no true sense of the term, and certainly not in the legal sense, can a spouse

(1) [1909] P. 123, 148.
(2) [1939] 1 All. E. R. 52, 57.
(3) [1939] S.C. 187, 193.

who gives his or her consent to a separation be held to have been deserted. A party cannot complain of that to which he or she voluntarily consents. Assuming, however, that there was no such agreement or consent, then, but only then, does it become necessary to determine whether the spouse alleging to be deserted was willing at the time of the alleged desertion that the deserting spouse should remain in the matrimonial home, and whether he or she was willing to render or fulfil the duties and obligations of the marriage. If not so willing, such deserted spouse again cannot succeed ; for such a spouse, himself or herself in default, cannot be heard to complain of the other spouse's default. In such case they are *in pari delicto*. But it is at this point—the determining of the willingness of the spouse alleging desertion to a continuance of the married state, with all which that involves—that it is necessary to bear in mind that such willingness does not necessarily imply the existence of any emotional *desire*. The deserted spouse may long to be freed from a life which he or she loathes and abhors; but, if he or she is passively *willing* to submit to its continuance, it is none the less competent for the Court to hold desertion established.

It is only by way of illustration of my first proposition, and because also of the somewhat close resemblance of its more important facts on the desertion issue, that I am tempted to refer a little more fully to *Spence v. Spence* (1). Throughout a large portion of their married life the husband, who was the petitioner, and his wife quarrelled bitterly, and before the parting all affection for one another had gone. It had become apparent to both parties that the situation had become intolerable. For a fortnight before she actually left her home the wife was engaged in quiet but open and active preparations for departure. The husband made no attempt to deter or even to delay his wife's departure. He had not the slightest regret at parting from his wife, and in a period of four years he had made no kind of effort to compass her return. Save for one cautious inquiry through a solicitor as to whether she had any

(1) [1939] 1 All. E. R. 52.

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intention in that matter, he did not concern himself about it at all. In these circumstances Langton J. said that it was quite impossible to describe a parting of this kind between the spouses as desertion by either side. He recognised the position as one "created by "the tacit consent of Mr. Spence to the departure of "his wife." It was, he added, impossible to contend that if the parties separated by consent, whether tacit or express, there could be any case of desertion. To hold otherwise would put it within the power of the parties to obtain a consensual divorce.

The facts of that case may not be identical with the present—no two cases, it is said, are absolutely identical in their facts—but in their essentially relevant facts they bear a remarkable similarity; and I can only say that I am strongly confirmed in the opinion which I had independently formed by the judgment and finding of a Judge of the eminence and of the experience in this class of case of Langton J.

If I am right in the conclusion which I have expressed above it is unnecessary for me to add anything further; but, should I be wrong in that conclusion, I would still hold against the petitioner on the ground that she had not satisfied me—and the onus, notwithstanding the unopposed character of the proceedings, is upon her to do so (see judgment of Lord Macmillan in *Pratt v. Pratt* (1)—that the respondent left her "without "reasonable excuse." Mr. Hanna, for the petitioner, whilst of course recognising that there could be no stronger reason for a husband leaving his wife than her commission of adultery, contended that this could not have been the respondent's reason for leaving as he had known of such adultery several years before, and, notwithstanding such knowledge, had voluntarily continued to live in the same house with her. I am not impressed with this argument. They had never lived as husband and wife since some time before Courtney's child was born. He was in fact nothing more than a lodger in Courtney's house; and it may be that the continuance of the adultery of which he may well have become aware made him finally decide

(1) [1939] A.C. 417, 420.

to leave a house in which, as I have already stated, he never should have resided at all. In his absence from the witness box we do not know conclusively what his reason or reasons for taking his departure may have been; but, sufficient reasons existing to constitute a "reasonable excuse," I am of opinion that the petitioner has failed in this regard also to establish her case. To hold otherwise, merely because the respondent has not appeared or given evidence in the case, would, it appears to me, throw open the door even wider than it already is to the admission of collusion.

Holding, as I do, that desertion has not been established in this case, I have not thought it right, following the practice of this Court, to open the petitioner's discretion statement; but I may be allowed to say that had I been faced with that issue on facts, which, I must assume, would be for the most part the same as those to which the petitioner deposed in her evidence, I should have declined to exercise my discretion in her favour, first, as unnecessary either to the parties themselves, whose child born in adultery could not be legitimised by their subsequent marriage, and, secondly, as being unnecessary in the interests of public morality. Thirdly, the consequences of a refusal to grant a decree would be merely the continuance of a state of affairs in which they have voluntarily acquiesced for a great number of years. These, I understand, on the authorities to be the main issues to be considered in exercising or refusing discretion to an erring petitioner; and, if I had ever reached that part of the case, I would have answered them all against the present petitioner. To do otherwise would, in my opinion, be to prostitute the jurisdiction, and to countenance and encourage a life of open and habitual adultery and sin. There will be no costs.

Solicitors for the petitioner: *John McKee & Son*

J. McC.

Ch. D. 1946.

Feb. 4; Mar. 18.

HERVEY-McLEAY AND OTHERS v. PATTON AND ANOTHER (1).

Landlord and Tenant—Lease—Provision against Assignment without Licence—Licence not to be unreasonably withheld—Proposed Assignment—Licence refused without reason given—Declaratory Order—Reasonableness—Costs.

A lease contained a provision that the tenants should not sub-let, assign or otherwise part with possession of the premises without the consent in writing of the landlords or their agent, such consent not to be unreasonably withheld. The tenants agreed to sell their estate and interest in the premises to another and applied to the landlords for consent to the proposed assignment. The landlords refused to give their consent, and no reasons were given for this refusal. On a summons asking for a declaration that the landlords' refusal to consent to the proposed assignment was unreasonable,

Held, that the power of the Court to make declarations of this type is not limited to cases where the landlord has given a reason which the Court considers to be bad, but that such declarations may also be made where the landlord has given no reason for his refusal.

Withholding of consent to a proposed assignment cannot be reasonable unless there is the possibility that the landlord will be prejudiced as a consequence of such assignment. The mere fact that the premises will be put to some use other than that represented by the tenant or contemplated by the landlord at the time of the lease will not justify the landlord in withholding consent.

Harrison, Ainslie & Co. v. Barrow-in-Furness Corporation (1891) 63 L.T. 834 doubted and distinguished.

ORIGINATING SUMMONS.

By a lease dated the 15th November, 1945, the defendants agreed to let to the plaintiffs certain premises at 58/60 Royal Avenue, Belfast, for the term of fourteen years. The lease contained the following provision :—

"4. The Tenants shall not sub-let assign or other-
"wise part with possession of the said premises or
"any part thereof without the consent (in writing)
"of the Landlords or their Agent first being obtained
"(such consent shall not be unreasonably withheld)."

(1) In the Chancery Division before Black J.

The demised premises had previously been used as a canteen for navy personnel, and at the time of the lease the plaintiffs represented that they intended to use the premises for carrying on a restaurant business.

By an agreement dated the 29th December, 1945, the plaintiffs agreed to sell their estate and interest in the premises to the Ministry of Finance, Northern Ireland. The purpose for which the Ministry of Finance proposed to acquire the premises was for accommodating the Ulster Savings Branch of the Ministry of Finance and the Ulster Savings Committee.

By letter dated the 29th December, 1945, the plaintiffs' solicitor applied on their behalf to the defendants for consent to the assignment of the premises to the Ministry. By letters dated the 12th and the 15th January, 1946, from their solicitor the defendants refused to give their consent to the assignment. No reason was given for this refusal.

The plaintiffs accordingly brought this summons asking for a declaration that the defendants' refusal to consent to the proposed assignment to the Ministry was unreasonable, and that notwithstanding such refusal the plaintiffs were entitled to assign the lease to the Ministry without any licence from the defendants.

Gibson for the plaintiffs.

Johnson for the defendants.

The arguments of counsel appear sufficiently in the judgment.

Cur. adv. vult.

BLACK J. [after stating the facts continued]: It appears to be settled that the proper construction to be placed upon a covenant in the form contained in clause 4 of the lease is that it is a qualified covenant by the tenants. Notwithstanding the use of the word "shall" in the qualifying clause it seems to be assumed in the cases that the covenant is of the type considered in *Treloar v. Bigge* (1) and *Sear v. House Property and Investment Society* (2), and that it does not impose any

BLACK J.

(1) (1874) L.R. 9 Ex. 151. (2) (1880) L.R. 16 Ch.D. 387.

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obligation upon the landlords to give their consent. (See *e.g.* per Cozens-Hardy M.R. in *Andrew v. Bridgman* (1) and per Neville J. in *Lewis & Allenby* (1909) *Ltd. v. Pegge* (2). But if the landlords are asked to consent to an intended assignment and either refuse their consent unreasonably or withhold their consent unreasonably the tenants are at liberty to proceed with the assignment without the landlord's consent. In such a case although the tenants cannot institute any proceedings against the landlords to compel them to consent, and have no cause of action against the landlords for refusing their consent, the Courts nevertheless in exercise of their power to give declaratory judgments have shown themselves very willing to make declarations at the suit of tenants of their right to assign without the landlords' consent in cases in which the Courts have been able to hold that the landlords' refusal to consent was unreasonable. Sometimes such declarations have been made in exercise of the Courts' powers under O. 25 r. 4 in actions brought by tenants for the purpose of obtaining such declarations. In other cases where the facts have not been in dispute the Courts have made the declarations in proceedings instituted by Originating Summons under the provisions of O. 54A.

The first point made by Mr. Johnson on behalf of the landlords is that there is no case to be found in the books in which such a declaration has been made at the suit of a tenant where his landlord has simply refused to consent without giving any reason for his refusal and he urges that such a case does not fall within the authorities holding the tenant entitled to obtain such a declaration. He relies strongly upon a passage in the judgment of Vaughan Williams L.J. in *Young v. Ashley Gardens Properties Ltd.* (3) where it was said : " It was urged upon us that a landlord is not " bound to give any reason for refusing his licence. " I agree ; but *if he does give a reason*, and chooses to " say, ' I will only grant a licence on this or that " ' condition,' which condition proves to be unreason-

(1) [1908] 1 K.B. 596, 598.
(2) [1914] 1 Ch. 782, 785.
(3) [1903] 2 Ch. 112, 115.

" able, and the matter then comes into Court, it seems " to me that it would be quite shocking if the Court " could not put an end to the dispute in the way the " learned Judge has done by this order." Mr. Johnson seizes upon the words " but if he does give a reason." He contends that these words show that in the opinion of Vaughan Williams L.J. the Court will only make a declaration of this type in a case where the landlord has in fact given a reason for his refusal which the Court can hold to be a bad reason, and that it will not make such a declaration where the landlord has simply refused to consent without giving any reason at all. I cannot agree that the power of the Court to make declaratory orders is limited in any such way, and I do not think it can be inferred from Vaughan Williams L.J.'s observations that he was addressing himself to or thinking of the question whether such declarations could or could not be made in cases where the landlord had given no reason for refusing to consent to the proposed assignment. To my mind it would be fantastic to hold that where a landlord had been foolish enough to give a reason for refusing his consent the tenant might obtain a declaration that it was safe for him to assign ; but that in a case in which the landlord had been sufficiently astute not to give any reason for his refusal the tenant would be left helpless in regard to obtaining a decision as to his legal rights and that he and his assignee would have to act at their peril and take the risk of the assignment being held unlawful and invalid under section 10 of Deasy's Act (1). I cannot express my view better than by reading from Vaughan Williams L.J.'s judgment—with the alteration of only one word—the sentences which immediately follow the passage which I have quoted above : " I " mean it would be quite shocking if, the parties having " come into Court, the Court were bound to say, " ' Although we have the whole matter before us, and " ' although we consider the refusal unreasonable, yet " ' we cannot go any further and we must leave matters " ' in this state, that the landlord may continue to " ' abstain from granting his licence and the tenant

(1) 23 & 24 Vict., c. 154.

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" ' must assign at his own risk.' " I cannot therefore accept Mr. Johnson's contention on this point which is really a point as to the extent to which the Court will exercise its jurisdiction to make declaratory orders. I refuse to hold that in exercising its jurisdiction to make declaratory Orders under O. 25 r. 4 and O. 54A the Court should regard itself as so fettered in cases of this type as to be precluded from making such an order where the landlord unreasonably refuses to give his consent to an assignment without proffering any reason. I am, of course, aware that the onus lies upon the tenant of establishing that the withholding of the consent was unreasonable. And, no doubt, if the landlord chooses to give a reason for his attitude the issue is narrowed and it is sufficient, at any rate in the first instance, for the tenant to show that that reason is an unreasonable one. But even if the landlord gives no reason, I think the tenant will ordinarily show a sufficient prima facie case in the first instance for holding the refusal to be unreasonable if he establishes that the proposed assignee is a person of unimpeachable character and repute and sound financial position, and that any use which he intends or is likely to make of the premises is a user which should be wholly unobjectionable from the point of view of the landlord.

Before turning to the particular facts of the present case one naturally seeks to ascertain what matters the Court will take into consideration in determining whether a landlord's consent has been unreasonably withheld. I do not think it necessary to review in detail the series of authorities in which the question has been discussed in relation to particular sets of circumstances. I think one can commence with the case of *Houlder Bros. & Co., Ltd. v. Gibbs* (1), which was so strongly relied upon by the plaintiffs. That case first came before Tomlin J. and at the outset of his judgment Tomlin J. propounds the question in these words (2):

" Where a lease contains a provision of this kind " under which a consent is not to be withheld un- " reasonably, ' unreasonably ' must be a word having

(1) [1925] Ch. 198, 575. (2) ibid 201.

"a meaning with reference to some particular con- "ditions, and the withholding must be unreasonable "in reference to some particular considerations. "The real question on such a clause is this: What "are the considerations which the Court is entitled "to regard in determining whether or not a particular "reason for refusal is justified within the meaning "of the clause?"

After discussing the authorities at length Tomlin J. adopts the narrower of these contentions. He says: "It is by reference to the personality of the lessee" (I think this clearly means the assignee) "or the nature "of the user of occupation of the premises, that the "Court has to judge of the reasonableness of the "lessor's refusal. It is quite true that the injury "threatened or apprehended to the lessor may be in "respect of something which has nothing to do with "the lease of the demised premises; it may be in "relation to other property of which he is the owner, "but the danger must come from the nature of the "user or occupation or from the personality of the "assignee. In the present case what is the real reason "for the refusal? The real reason is not one which "had anything to do with the personality of the lessee, "or with the user or occupation of the premises" (1). The case went to the Court of Appeal and that Court affirmed Tomlin J.'s judgment, holding as he did that the lessor's consent could only be legitimately withheld on some ground connected either with the personality of the intended assignee or with the user which he was likely to make of the property. If the principle laid down by Tomlin J. and the Court of Appeal in this case of *Houlder Bros. & Co., Ltd. v. Gibbs* (2) is good law and if the only matters to which the Courts are entitled to have regard in considering whether or not the landlord's consent to an assignment has been unreasonably withheld are the personality of the assignee and the user proposed to be made of the premises it is obvious that the present application must fall to be decided in favour of the plaintiffs. From the point of view of respectability and solvency nothing could,

(1) ibid, 209. (2) [1925] Ch. 198, 575.

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I take it, be said against the proposed assignees the Ministry of Finance. The landlords' rent will be at least as secure as if the lease remained in the hands of the original tenants. And the proposed user of the premises by the Ministry is at least as innocuous and unobjectionable as the intended user by the original tenants was likely to be. The decision in *Houlder Bros. & Co., Ltd. v. Gibbs* (1) has not, however, remained without criticism. In *Viscount Tredegar v. Harwood* (2) Viscount Dunedin said that he was not inclined to adhere to the pronouncement that reasonableness was only to be referred to something which touched both parties to the lease. He would read reasonableness in the general sense. And Lord Phillimore stated (3) that he shared the doubt expressed by Lord Dunedin as to the soundness of the judgment in *Houlder Bros. & Co., Ltd. v. Gibb* (1). "If it be a question," he said, "whether a man is acting reasonably, as distinguished "from justly, fairly, or kindly, you are to take into "consideration the motives of convenience and interest "which affect him, not those which affect somebody "else."

Notwithstanding these criticisms I find that *Houlder Bros. & Co. Ltd. v. Gibb* (1) has subsequently been quoted by Bennett J. in *Premier Confectionery (London) Ltd. v. London Commercial Sale Rooms Ltd.* (4), and by Slesser L.J. in *Lambert v. F. W. Woolworth & Co.* (5), as establishing the limits to the grounds upon which a landlord can under such a clause refuse his consent to an assignment. Still even if the wider view which was rejected by Tomlin J. and the Court of Appeal in *Houlder Bros. & Co. Ltd. v. Gibb* (1) can legitimately be taken as to the grounds upon which a landlord is entitled to refuse to consent, it would seem to me that he could hardly be said to be acting reasonably in refusing his consent unless there existed a possibility that in some way or other he might be prejudiced as a consequence of the assignment. In the present case if the proposed assignment took place the landlords

(1) [1925] Ch. 198, 575.
(2) [1929] A.C. 72, 78.
(3) ibid 81, 82.
(4) [1933] Ch. 904, 912.
(5) [1938] Ch. 883, 907.

would, so far as I can see, be quite as well off as they had been before the assignment. They would have at least as desirable a tenant in possession of the premises, a tenant to whom they could look with absolute confidence for the payment of the rent during the term of the lease, and a tenant who could be relied upon not to put the premises to any objectionable or undesirable use. The only way so far as I can see that they could possibly be prejudiced by consenting to the assignment is that they might hope that if they did not consent the tenants might be compelled to surrender the premises and that the landlords might thereupon be able to obtain from the Ministry either a larger rent than that reserved by the present lease or else a premium in addition to the rent. But any suggestion that this would be a legitimate ground upon which to withhold consent is, I think, negatived by the decision of the Court of Appeal in *Bates v. Donaldson* (1). In that case A. L. Smith L.J. says (2): "Now, when the lessor granted the lease he parted "with his interest in the premises for the entire term. "The tenant during that term can assign to any "respectable and responsible assignee—in which case "the lessor is bound not to unreasonably withhold his "permission. It is not, in my opinion, the true "reading of this clause that the permission can be "withheld in order to enable the lessor to regain "possession of the premises before the termination of the "term. It was in my judgment inserted alio intuitu "altogether, and in order to protect the lessor from "having his premises used or occupied in an undesirable "way or by an undesirable tenant or assignee, and not "in order to enable the lessor to, if possible, coerce a "tenant to surrender the lease so that the lessor might "obtain possession of the premises, which was the "reason why in the present case the assent was "withheld."

The grounds on which the defendants claim to be entitled to withhold their consent are set out in the affidavits of Mr. William Denis Johnston and Mr. Harold Russell. Mr. Johnston and Mr. Russell do

(1) [1896] 2 Q.B. 241. (2) ibid, 247.

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not suggest that they have any objection to the personality of the proposed assignees or that they apprehend that the proposed assignees would put the property to any undesirable or objectionable use. Nor do they suggest that after the intended assignment they would be one whit worse off with the Ministry of Finance as their tenants than they would be if no assignment took place and if the plaintiffs accordingly remained their tenants during the residue of the term. What, however, the defendants say is this. The premises were requisitioned by the Naval Authorities during the war and were fitted up by them as a canteen and club for Naval Personnel. The club had been carried on in a first rate manner by Petty Officer Allen and the premises as fitted up and maintained by the Naval Authorities were in excellent condition for carrying on a restaurant business. After the termination of hostilities the plaintiffs, Commander Hervey-MacLeay and Commander Pollock who were naval officers, got in touch with the landlords' agents and informed them that they were anxious to take the premises. They said that they had taken in with them Mr. Isherwood (a well-known caterer in Belfast) and that if they got the premises they proposed to form a small Company with the intention of carrying on a restaurant business on the premises. They mentioned Petty Officer Allen who had been running the club for the naval authorities and said that in view of his excellent services they proposed to employ him as manager and that this would also give him something to do. This proposition had obvious attractions for the landlords from the business point of view. If the premises were let to tenants who intended to use them as a restaurant advantage would be taken of the alterations and improvements which had been made by the Naval authorities for the purpose of fitting them up as a canteen, and the premises could be put into use by the tenants practically at once and in their existing condition. There would be nothing of the delay which would be inevitable if, in order to suit some ordinary business tenant, the premises had to be altered back to the condition in which they were before

they were requisitioned. And the landlords would be saved the troublesome and perhaps unsatisfactory task of compiling and endeavouring to make good against the Naval authorities a claim to be recouped the expense of carrying out the necessary alterations. Moreover, I am quite sure that apart entirely from the purely business aspect of the matter, the proposal was one calculated to attract the sympathy of both Mr. Johnston and Mr. Russell. They would both be likely to be most sympathetic to a proposal of this nature put forward by gentlemen who had a record of service in the Navy. Of the three intended partners two were naval officers. The scheme appeared to provide them with an opportunity of having a share in what seemed to be a promising business enterprise. And it would also provide a career for Petty Officer Allen in a position for which he had apparently already demonstrated his capacity. One is not surprised that Mr. Johnston and Mr. Russell accepted the proposal and agreed to grant a lease of the premises to Commander Hervey-MacLeay, Commander Pollock and Mr. Isherwood. I accept without hesitation the defendants' contention that in making the letting they were greatly influenced by the considerations which I have just mentioned. Mr. Johnston goes so far as to say that if he had been aware that the plaintiffs did not themselves intend to carry on business in the premises as *restaurateurs* he would not have agreed to give the lease. I accept this statement too; but it is to be observed that no one has said that it was ever conveyed to the plaintiffs either that the granting of the lease was conditional on their setting up and carrying on the business of *restaurateurs* or that the defendants would not have granted the lease to them if the defendants had been aware that they did not themselves intend to carry on that business. Nor has anyone ventured to say that there was a clear contract by the lessees that they would use the premises for carrying on personally the business of *restaurateurs*. Whatever may have been their precise reason, the plaintiffs never in fact started business in the premises. According to the affidavit of Mr.

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Russell, which the plaintiffs have not sought to contradict, extensive advertisements appeared in the Belfast local papers offering the premises "For Sale" or "To Let" within a few weeks after they had been taken over by the plaintiffs. And the agreement for the sale of their interest to the Ministry of Finance was made on the 29th December, just over six weeks after the date of the lease. It is not surprising that in the circumstances the landlords should feel rather resentful. They tell us that in agreeing to make the lease they had been greatly influenced by the fact that Commander Hervey-MacLeay, Commander Pollock and Petty Officer Allen had served in the Navy, and by a natural and sympathetic desire to assist a project which would enable men who had served to set up what seemed to hold promise of being a successful business. So far did this motive weigh with the landlords that, as I have previously mentioned, they say that they would not have agreed to make the lease if they had been aware that the plaintiffs did not themselves intend to carry on business in the premises as *restaurateurs*. One cannot help feeling sympathy with the landlords' resentment at seeing the plaintiffs making, so far as the landlords can observe, no real effort to start business in the premises, but on the contrary proceeding to negotiate a sale of their interest under the lease for no less a sum than £2,000 within a few weeks after they succeeded in obtaining the lease.

I have not, however, been referred to, nor have I been able to find, any reported case in which under such a clause as clause 4 the landlords have been entitled to refuse their consent on any grounds such as those upon which they seek to rely in the present case. As I have already observed if the principle laid down by Tomlin J. and the Court of Appeal in *Houlder Bros. & Co., Ltd. v. Gibb* (1) is to be accepted as good law, the only matters to which one is entitled to look in considering whether the landlords had acted unreasonably in refusing their consent are the personality of the proposed assignee and the use which he intends or is likely to make of the premises. But even if this principle is too narrow, and if we are entitled to

(1) [1925] Ch. 198, 575.

take a wider view of the matter, I do not know of any case where the Court has held that the landlords could reasonably refuse their consent where it was admitted (as it would have to be admitted in the present case) that on no conceivable ground could they suffer any prejudice by the proposed assignment, and that after the proposed assignment with the assignee as tenant they would be quite as well off as if the original lessee remained the owner of the lease. The case which is most strongly relied on by the defendants' counsel is *Harrison, Ainslie & Co. v. Barrow-in-Furness Corporation* (1). In that case a lease of land with an iron furnace and mill and certain water rights for the purpose of working the same contained a covenant on the part of the lessees not to assign without the consent in writing of the lessors, such consent not to be unreasonably refused or refused to a person of responsibility and respectability. There was no covenant in the lease to work the furnace and in 1889 the lessees entered into an agreement with the Barrow Corporation to assign to them the residue of the term upon certain special conditions under which the Corporation bound themselves not to use the water rights in connection with the manufacture of iron or steel. The lessors refused to consent to the assignment on the ground that the Corporation could not use the premises for the purpose for which the lease was granted. Romer J. held that the lessors' consent had not been unreasonably withheld.

Mr. Johnson seeks to rely upon *Harrison, Ainslie & Co.'s case* (1) in this way. He says that just as in that case the premises demised were an iron furnace and were demised for use as an iron furnace though there was no covenant on the part of the lessees to work the furnace, so in the present case the premises demised were a restaurant and were demised to be used as such though there was no express covenant to that effect in the lease. Accordingly he contends that in the present case the landlords are entitled to withhold their consent to an assignment under which the premises would cease to be used as a restaurant, just

(1) (1891) 63 L.T. 834.

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as in *Harrison, Ainslie & Co.'s case* (1) the lessors were entitled to refuse their consent to an assignment under which the premises would cease to be worked as an iron furnace. It may perhaps be open to considerable doubt whether the decision in *Harrison, Ainslie's case* (1) even upon the point upon which Mr. Johnson seeks to use it is a sound decision. One of the grounds upon which Romer J. based his decision in the case was that a municipal corporation did not come within the words "a person of responsibility and respecta- "bility" used in the lease. His decision on this point has been overruled by the Court of Appeal in *Willmott v. London Road Car Co. Ltd.* (2), and if his decision on this point was wrong it appears to me that the case ought to have been decided in precisely the opposite way from which he in fact decided it. For the covenant in that case provided that the lessor's consent was not to be unreasonably refused or refused to a person of responsibility and respectability. Under a covenant in this form the consent could not be refused if the proposed assignee was a person of responsibility and respectability. If the proposed assignee was a person of responsibility and respectability it became quite unnecessary to consider whether the lessors were acting reasonably or unreasonably in refusing their consent. Romer J. clearly recognized this in his judgment, for he says in regard to the first point, namely whether the Corporation could be considered "a person of responsibility and respectability," that if this point was decided in favour of the plaintiffs (the lessees) it would end the whole matter (3). *Willmott's case* (2) decided that a municipal corporation could be a person within the proviso to the covenant, and if so I think it could hardly be disputed that the Barrow-in-Furness Corporation was a person of responsibility and respectability and that *Harrison, Ainslie's case* (1) was therefore wrongly decided. Assuming, however, that Romer J.'s decision on the other point was sound in law I think that the true explanation of that decision is the explanation given by Tomlin J. in

(1) (1891) 63 L.T. 834.
(2) [1910] 2 Ch. 525.
(3) (1891) 63 L.T. at 836.

the course of his judgment in *Houlder Bros. & Co. Ltd. v. Gibb* (1), namely, that if the Barrow Corporation had obtained the proposed assignment the chance of the iron furnace being worked would have disappeared for good and all, which would have been, or might have been, injurious to the lessors, and that the lessors were accordingly entitled to say that the Corporation were not suitable assignees and that the user (or non-user) of the premises by the Corporation would not be such a user as they were bound to assent to. In other words, the point on which the decision turned was that the proposed user (or non-user) of the premises by the Corporation might be prejudicial to the lessors, and the decision is only another authority for the proposition that this is the consideration to which one has to have regard in deciding whether lessors have acted unreasonably in withholding their consent. Accordingly, even on the basis of what was decided in *Harrison, Ainslie's case* (2), the real question in the present case is whether the lessors could be prejudiced in any way by the proposed assignment. In *Harrison, Ainslie's case* (2) there was only one use to which the iron furnaces could be put. If they were not worked as iron furnaces they would simply become useless and derelict. In the present case the demised premises could be put to many uses besides that of a restaurant. There is nothing in the lease compelling them to be used as a restaurant or contemplating that they would not be used for any other purpose. If utilized by the Ministry of Finance for the purposes for which the Ministry have agreed to purchase them they will not become useless and deserted like the iron furnaces in *Harrison, Ainslie's case* (2). Nor so far as appears from any evidence before me will the landlords be in any way worse off than if they had been used as a restaurant. Accordingly, even if Romer J. was correct in holding in *Harrison, Ainslie's case* (2) that the lessor's consent to the intended assignment was not unreasonably withheld, I do not think that his decision on that point affords any real foundation for the contentions sought to be based upon it in the present case.

(1) [1925] Ch. 198, 208. (2) (1891) 63 L.T. 834.

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The real contention, however, put forward by the defendants in the affidavits filed on their behalf is a somewhat different one. It amounts to this, that, in deciding whether the landlords' consent to an assignment is unreasonably withheld, the Court is not bound to confine its attention to what will be the effect of the assignment from the landlord's point of view, but is also entitled to take into account the tenant's conduct and representations in originally obtaining the lease. As I have already said I have not been referred to any case in which the landlords have been held entitled to refuse their consent on any other ground than that they would be prejudiced in some way as a result of the assignment. So far as I have been able to discover the Courts have always focussed their attention upon the proposed assignment and its possible effects, and have never taken into account any consideration which did not directly bear upon this point. As a good example of a case in which the Court insisted on confining its attention to the possible effects of the assignment and declined to take into account such collateral matters as the conduct of the tenant, I would refer to *In re Winfrey and Chatterton's Agreement* (1). In that case the subject matter of the tenancy was a dwelling house at Hunstanton, and the person entitled to the landlord's interest, who had purchased the house with the hope of obtaining it for her own personal occupation, refused her consent to a proposed assignment of the tenancy on the ground that she herself had a verbal contract with the tenant for the purchase of the tenant's interest in the house. The tenant denied that she had entered into any such contract and took out an originating summons asking for a declaration that she was entitled, in the events which had happened, to assign the tenancy notwithstanding that the defendant had refused her consent. In that case, as in the present case, the landlord did not allege any objection to the personality of the assignee or to the use which the assignee intended to make of the premises. The ground upon which the landlord relied in that case as justifying her refusal of her consent to the assign-

(1) [1921] 2 Ch. 7.

ment was a breach of faith on the part of the tenant. Just as in the present case the landlords allege that they were induced to make the letting by a representation that the tenants intended personally to carry on a certain specified business in the premises, so in the case of *In re Winfrey and Chatterton's Agreement* (1) the landlord alleged that the tenant had entered into an actual verbal bargain to sell her the tenancy. In that case, however, Sargant J., after referring at length to *Bates v. Donaldson* (2), held that the circumstances alleged by the landlord did not constitute in law a good ground for her refusal to consent to the assignment. He clearly took the view that the only question to which one was entitled to have regard under such a clause was whether the landlord would be any worse off by reason of the assignment and that one was not entitled to take into account extraneous or collateral circumstances—such as the conduct or behaviour of the tenant—which were not in any way relevant to that consideration. He says (3): "The defendant is really asserting her right "as lessor in order to strengthen her position as pur- "chaser of the premises. In my opinion the landlord "is not entitled so to use her power to withhold her "assent, but can use that power only to secure herself "her proper right not to have an undesirable "assignee."

It may well be that if the parties were coming to negotiate anew the terms of the lease in the present case the landlords might, in the light of what has happened, insist on the insertion of conditions much more stringent than those contained in the lease which has been actually executed. They might for example insist upon a condition that the premises should not be used, except with the landlord's consent, for any purpose other than a restaurant. Or they might perhaps insist on an absolute covenant precluding the tenants from assigning or subletting without the landlord's consent, omitting any qualifying proviso that the landlord's consent should not be

(1) [1921] 2 Ch. 7.
(2) [1896] 2 Q.B. 241.
(3) [1921] 2 Ch. 7, 10.

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unreasonably withheld. It is idle, however, to speculate as to this. What we have to endeavour to ascertain is the effect of a lease in the terms of the document which the parties in fact executed. What we have here is a lease containing a qualified covenant against assignment in a well-known form and we have to give that covenant the effect which has been given to it in the reported decisions. Or it may perhaps be that the landlords might have some right on the grounds suggested in their affidavits to set aside the lease on the ground that they were induced to make it by misrepresentations on the part of the tenant. As to the possibility of such a claim or the difficulties which the landlords might encounter in seeking to sustain such a claim, I say nothing. No such claim is before me; and I therefore treat the case as one regarding the construction and effect of a valid and subsisting document and decide it upon the lines laid down by the Courts in the cases decided upon the construction and effect of clauses in the form of clause 4 of the lease of 15th November, 1945. Whatever may be the precise limits of the circumstances to which the Court under such a clause is entitled to have regard, I cannot find any case in which it has been held that a landlord could be regarded as acting reasonably in withholding his consent if it was established that after the proposed assignment he could have a tenant of unimpeachable character and solvency using the premises in an entirely unobjectionable manner and would not be in any respect whatever worse off than if the original lessee had continued to hold the tenancy. Accordingly, I come to the conclusion that in the present case the plaintiffs are entitled to the declarations which they claim.

With regard to costs, it was formerly considered that, as a matter of principle, costs against the lessors ought not to be allowed to lessees who succeed in obtaining declarations of this type, inasmuch as the lessors' refusal to consent does not give the lessees any cause of action (*Jenkins v. Price* (1), *Evans v. Levy* (2)). But in *West v. Gwynne* (3) the Court of Appeal over-

(1) [1907] 2 Ch. 229.
(2) [1910] 1 Ch. 452.
(3) [1911] 2 Ch. 1.

ruled *Jenkins v. Price* (1) and *Evans v. Levy* (2) in this respect and expressed the view that if a declaratory order ought to be made the costs should follow the event. I see no reason why the plaintiffs should not have their costs against the defendants in the present case.

Solicitor for the plaintiffs : *A. S. Merrick.*
Solicitor for the defendants : *G. H. Leitch.*

M.V.P.

(1) [1907] 2 Ch. 229. (2) [1910] 1 Ch. 452.

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Feb. 7, 8.; Mar. 29.

MORTON AND OTHERS v. THE AIR MINISTRY AND ANOTHER (1).

Trade Dispute—Civilian Employees of Air Ministry—Servants of the Crown—Trade Disputes and Trade Unions Act (Northern Ireland), 1927 (17 & 18 Geo. 5, c. 20), section 6—Crown not bound by Statute—Legislative powers of Parliament of Northern Ireland—" Air Force matter "—Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), section 4 (1).

Section 6 of the Trade Disputes and Trade Unions Act (Northern Ireland), 1927, provides that " it shall not be lawful " for any local or other public authority . . . to impose any " condition upon persons employed by the authority whereby " employees who are or who are not members of a trade union " are liable to be placed in any respect either directly or indirectly " under any disability or disadvantage as compared with other " employees."

The Air Ministry during the War agreed with certain trade unions to employ Government-trained civilian mechanics (called " dilutees ") on skilled work previously done by apprentice-trained craftsmen, the Air Ministry undertaking that when skilled labour became available the former practice would be restored. In pursuance of this undertaking the Air Ministry in 1945 gave instructions that where skilled craftsmen became available for employment at any unit the " dilutees " should be discharged in numbers sufficient to provide for the absorption of the skilled men available. The plaintiffs were " dilutees " who had received notice of dismissal. It was contended by the plaintiffs that their dismissal was unlawful and in violation of section 6 of the Act.

Held, that the plaintiffs were servants of the Crown, and that the Crown was not included in the words " other public authority " in section 6 on the grounds (i) that it would require a very clear expression in an Act of the Parliament of Northern Ireland that the intention was to bind the Crown where the result would be to affect the Crown's administration of its Imperial Departments, and (ii) that the general words " other public authority " following the particular mention of local authorities could not be deemed to include departments of State which are of a higher nature than local authorities.

Semble, that even if section 6 did purport to bind the Crown it would by virtue of the limitations placed on the legislative powers of the Parliament of Northern Ireland by section 4 (1) of the Government of Ireland Act, 1920, be ineffective to control the actions of the Crown in any matter relating to the armed forces of the Crown.

(1) In the Chancery Division before Black J.

ORIGINATING SUMMONS.

The plaintiffs were a number of men employed as civilians in the maintenance of aircraft at Air Ministry establishments in Northern Ireland. Before 1939 the only civilians employed in such work were apprentice-trained craftsmen who had served a regular term of apprenticeship to some branch of the engineering industry, but shortly after the outbreak of war it was agreed between the Air Ministry and the trade unions concerned that in certain circumstances men who had not served such a term of apprenticeship might be employed in this class of work. Such men were given special training in a Government Training Centre or a Royal Air Force Technical Training School, and these men were termed Government-trained mechanics, or more commonly "dilutees."

The plaintiffs belonged to this latter class of workers, and before entering on his employment each had signed an application form—Form 1707—in which one of the conditions was :—

"If employed I understand that . . .

"(b) the conditions of my employment are defined "in Air Publication 826 (Regulations for civilians "employed at Air Ministry establishments), and "in such additions and amendments thereto as the "Air Council may at any time direct."

Sub-paragraph (f) of paragraph 98 of Air Publication 826, dealing with the discharge of civilians employed at Air Ministry establishments, laid down certain conditions which were to be observed in deciding which employees should be discharged where a reduction in the number employed had to be made on the ground of redundancy.

Paragraph 4 of Air Ministry Order A324/1945, promulgated by command of the Air Council on the 5th April, 1945, directed that in compiling the list of workers to be discharged in case of redundancy regard should be had to certain considerations, one of which was that "No fully skilled craftsman will be selected "for discharge until all dilutees employed in the "establishment on the same class of work have been "discharged or transferred to work other than skilled."

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Air Ministry Order A1120/1945, promulgated by command of the Air Council on the 15th November, 1945, provided as follows :—

"1. The procedure to be adopted when it becomes "necessary to discharge employees as a result of "redundancies is laid down in A. M. O. A324/1945 "and the provisions of A. P. 826 paragraph 98 (f) "are amended by that Order.

"2. Agreements made with the craft Unions "provide that, to meet war conditions, dilutees may "be employed in jobs normally done by skilled "craftsmen, and that semi-skilled labourers may be "employed to supplement the work of skilled "craftsmen. Under the terms of the agreements an "undertaking was given that when skilled labour "becomes available a restoration to the pre-"Agreement practice would be made.

"3. Consequently A. M. O. A324/1945, para. 4, "sub-para. (11) provides that no fully skilled "craftsmen will be selected for discharge in case of "redundancy until all dilutees employed in the "establishment on the same class of work have been "discharged or transferred to work other than "skilled.

"4. Cases may arise, however, where though there "is no actual redundancy at a unit skilled craftsmen "may become available for employment in the unit "through the return of men from the Forces, the "closing down of munitions factories or other "causes. Should such circumstances arise the "agreements referred to above will apply and "dilutees will be discharged in numbers sufficient "to provide for the absorption of the skilled men "available.

"5. The provisions of para. 98 of A. P. 826 are "modified accordingly."

In pursuance of the policy set out in Air Ministry Order A1120/1945 the plaintiffs received notice of dismissal during the last week of November, 1945, terminating their employment on fourteen days notice, the reason given in each case being redundancy. It was alleged by the plaintiffs and not denied by the

defendants that no actual condition of redundancy existed in the establishments concerned, and that the plaintiffs would be immediately replaced by apprentice-trained workers who were members of the craft Unions.

The plaintiffs accordingly instituted the present proceedings for the purpose of having it determined (1) whether upon the true construction of section 6 of the Trade Disputes and Trade Unions Act (Northern Ireland), 1927, (1) the amendments of paragraph 98 of Air Publication 826, effected by Air Ministry Order A324/1945 and Air Ministry Order A1120/1945 constituted the imposition of conditions whereby the plaintiffs were liable to be placed under a disability or disadvantage as compared with other employees within the meaning of section 6, and (2) whether these amendments were *ultra vires* the employer's powers upon the true construction of section 6 and were void, and (3) whether the dismissals of the plaintiffs were *ultra vires* the powers of their employer and were unlawful. They further asked for declarations that the said amendments were void and of no effect and that the plaintiffs were entitled to equal treatment with apprentice-trained craftsmen.

Nicholson K.C., and *McVeigh* for the plaintiffs.

Patton K.C., and *Topping* for the defendants.

Cur. adv. vult.

BLACK J. [after stating the facts continued]: The first question to be considered is what was the exact

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(1) Trade Disputes and Trade Unions Act (Northern Ireland), 1927, sec. 6, sub-s. 1: "It shall "not be lawful for any local or "other public authority to make "it a condition of the employment "or continuance in employment of "any person that he shall or shall "not be a member of a trade union "or to impose any condition upon "persons employed by the authority "whereby employees who are or "who are not members of a trade "union are liable to be placed in "any respect either directly or "indirectly under any disability or "disadvantage as compared with "other employees."

Sub-s. 3: "Any condition im-"posed in contravention of this "section shall be void."

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position of the plaintiffs when employed at the Air Ministry establishments ? Who were their employers ? In the affidavit, filed on behalf of the defendants by Mr. Reginald Monk Jones, an assistant Secretary of the Air Ministry, it is stated that the plaintiffs' services were engaged by the Air Ministry and that they were in the employment of the Crown, and this appears to be borne out by the wording of A. P. 826, Chapter 1 of which is headed "Entry of Civilians into Air "Ministry Employ." Mr. Nicholson, on behalf of the plaintiffs, has endeavoured to show by reference to the relevant statutes and statutory orders that this does not give an accurate view of the position and that the true constitutional position was that the plaintiffs' employers were not the Air Ministry but the Air Council. Personally I do not think it matters in the least whether the plaintiffs are described as having been employed by the Air Ministry or by the Air Council. It appears quite clear to me that while in that employment they were Crown servants. They were employed by one of the great departments of State and were remunerated out of moneys provided by Parliament. To use an expression which one frequently finds in modern Acts of Parliament, they were persons employed by or under the Crown. Their position as civilian employees of the Air Ministry or the Air Council appears to me to be analogous to that of the civilian telephone attendant employed by the Admiralty at Rosyth Dockyard whose position was considered by the Court of Session in *Mulvenna v. Admiralty* (1). Being an employee—albeit in a humble position—of a Government department he was a servant of the Crown, and the Court of Session accordingly held that as a Crown servant his wages were exempt from arrestment. The question then which appears to rise at the very outset of the case is whether the section upon which the plaintiffs rely—section 6 (1) of the Trade Disputes and Trade Unions Act (Northern Ireland), 1927—is a section which has any application in the present case ? Section 6 (1) is an enactment directed to certain classes of employers—local and

(1) [1926] S.C. 842.

other public authorities—and it imposes restrictions upon those classes of employers in regard to the conditions which they may introduce into the contracts which they make with their employees. Do the provisions of section 6 (1) bind the Crown ? I cannot think that they do. Quite apart from the general question of whether section 6 (1) of the Act of 1927 upon its true construction is a section affecting and binding the Crown as employers, the defendants submit that in any event the sub-section could not be operative in the present case by reason of the provisions of section 4 (1) of the Government of Ireland Act, 1920. This section provides that the Parliament of Northern Ireland shall not have power to make laws in respect of, *inter alia*, the Navy, the Army, the Air Force, the Territorial Force or any other naval, military or Air Force matter. It is urged that the terms and conditions upon which the department responsible for the Air Force employs personnel (whether enlisted members of the Air Force or civilian employees) for the purpose of servicing and maintaining Royal Air Force machines constitute an "Air Force matter" within the meaning of section 4 (1) the Act of 1920 and therefore cannot be affected by an Act passed by the Parliament of Northern Ireland. As at present advised I incline to think that this contention is sound. It might seriously hamper the efficiency of the Air Force if the Parliament of Northern Ireland could by its legislation import terms into the conditions of employment by the Air Force of civilian personnel in Northern Ireland which were unacceptable to the department of State responsible for the maintenance of the Force or which raised difficulties or impossibilities of administration. Accordingly, it would seem to me that the conditions of employment even of civilians for the purpose of maintaining R.A.F. machines would be within the intendment of the provision in section 4 (1) debarring the Parliament of Northern Ireland from making laws in respect of any Air Force matter. If, however, I am wrong as to this I am nevertheless quite satisfied that section 6 (1) of the Act of 1927 is not to be construed as binding the Crown. The Crown is not bound

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by the provisions of any statute unless it is referred to either directly or by necessary implication. And, of course, the Crown for this purpose means not only the King personally but includes also the various departments of the executive government. The Crown is not named in section 6 (1), nor can I see any indication in the section of any intention to bind the Crown by necessary implication. On the contrary, I think there are several considerations which point strongly in the opposite direction. The relevant words of the section are: "It shall not be lawful for any "local or other public authority . . ." If the Crown or the Department employing the plaintiffs is to be bound it must be because that department is included in the words "or other public authority."

Mr. Nicholson relies upon a dictum of Lord Sterndale M.R. in *The Danube II* (1), to the effect that the Crown is a public authority. That was for the purpose of the Public Authorities Protection Act and it does not appear to me to follow from this dictum that the Crown or a Government department must be held to be a public authority within the meaning of the phrase which we have to consider in section 6 (1) of the Act of 1927. As against this dictum of Lord Sterndale may be placed the decision of the Divisional Court in *Swaits v. Entwistle* (2). In that case the Court had to consider the effect of a provision in section 11 (2) of the Road Transport Lighting Act, 1927, enacting that the powers of any local or other authority under any Act to make orders, by-laws or regulations with respect to the carrying of lights by vehicles shall cease and determine. It was held that upon the true construction of the section the words "or other "authority" did not include the Minister of Transport and that accordingly his power to make regulations under the provisions of an earlier Act was not revoked.

The first point that occurs to one in considering the argument that the provisions of section 6 (1) of the Act of 1927 are to be read as binding the Crown is that it would seem prima facie a somewhat striking exercise of the Northern Ireland Parliament's powers

(1) [1921] P. 183, 187. (2) [1929] 2 K.B. 171.

of legislation if it saw fit to pass a statute purporting to regulate the terms upon which departments of the Imperial Government could enter into contracts of employment with such of their servants as might chance to be employed in Northern Ireland. Remembering the very exceptional and privileged position which the Crown has always been held to occupy at Common Law in regard to the conditions of employment of its servants one would expect that if any legislation imposing restrictions upon employers in regard to the terms of employment of their employees was intended to bind the Crown pains would be taken to make this quite clear in the Statute. And this I think would be doubly the case if the legislation was intended to bind departments of the Imperial Government. In the absence of a very clear expression of that intention in the statute one would be slow indeed to hold that it was within the scope and intention of an Act of Parliament of Northern Ireland to interfere with the administration of the great departments of the Imperial Government by dictating the terms upon which they might employ their servants in Northern Ireland even assuming that it was within the competence of the Legislature of Northern Ireland to pass an Act of Parliament having this effect. Moreover, quite apart from these considerations I think that the form and wording of the provision in section 6 (1) of the Act of 1927 upon which the plaintiffs rely show that the provision was not intended to affect the Crown. The relevant words are : " It shall not be lawful for " any local or other public authority . . ." Without any disrespect to local authorities I think it must be conceded that the great departments of State are of vastly greater prestige and importance than any local authority in Northern Ireland. If the legislation was intended to affect these great departments of State as well as local authorities one feels certain that the Statute would have mentioned these departments specifically. It would never have put local authorities specifically in the forefront leaving departments of State to be swept in merely by an " and others " phrase. This seems simple commonsense. And that

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it is a consideration which has commended itself to the Courts is shown by the cases cited in the text-books as establishing the principle that general words following particular words will not include anything of a class superior to that to which the particular words belong (Craies, *Statute Law*, 4th Ed., p. 167; Maxwell, *Interpretation of Statutes*, 8th Ed., p. 297). A neat example is the old case of the *Earl of Ailesbury v. Pattison* (1), which was cited by Mr. Patton. The statute 22 and 23 Car. II, c. 25, empowered all lords of manors or other royalties to grant a deputation to a gamekeeper. It was held that this wording did not empower a lord of a hundred or a wapentake to grant such a deputation. In giving judgment, Lord Mansfield says : " In the statute of Car. II the words, " ' other royalties,' are used, but that must mean " royalties of the same nature with manors. If " royalties of a higher nature had been meant, the " statute would have begun with them." Another way, perhaps, of putting the argument is this : If the words " public authority " in the section were wide enough to include government departments there would have been no point at all in using the phrase " local " authority as well, for a local authority is clearly a type of public authority. The fact that the Legislature used the term " local " authority shows that it had in mind certain types only of public authorities, namely, in the first place the type which it actually specifies, local authorities, and in the second place, other public authorities of somewhat similar rank. Whatever way, however, one views the section and whatever canon of construction one endeavours to apply to it I think it is quite clear both from the natural wording of the section and from the probabilities of the case that the Legislature never intended that the section should bind the Crown or the great departments of State. This is, of course, enough to decide the case against the plaintiffs. The whole basis of their case is that section 6 (1) of the Act of 1927 binds their employers and once it is determined that that section does not affect the Air Ministry or the Air Council the plaintiffs' case fails *in limine*.

(1) (1778) 1 Doug. 28.

In view, however, of the possibility of the case being taken further I think it right to point out that there are other difficulties which the plaintiffs would have had to overcome before obtaining the relief which they claim, even if they had been employed by a public authority within the meaning of section 6. I pass over the argument based upon the constitutional principle affirmed in such cases as *Dunn v. Reg.* (1), that servants of the Crown prima facie hold their employment subject to a condition that the Crown has power to dismiss them at any time, for undoubtedly an exception to this rule could be established by statute (*Gould v. Stuart* (2)), and we come back to the question whether section 6 of the Act of 1927 binds the Crown and effectively establishes such an exception. I will only say that I can hardly imagine a Court holding that the Legislature had intended to make an inroad upon such a well-established constitutional principle by a statutory provision clearly affecting certain classes of subjects of the Crown but which made no specific mention whatever either of the Crown or of Crown servants. The difficulties to which I would like shortly to refer to are these. The plaintiffs' cause of complaint is that they have been dismissed to make room for apprentice-trained craftsmen. No doubt A. M. O. A324/45 and A. M. O. 1120/45 were promulgated in pursuance of agreements made with the craft Unions and for the benefit of members of the craft Unions. But the distinction drawn in these orders is not between dilutees and members of craft Unions but between dilutees and skilled craftsmen. I quite recognize that a large percentage—perhaps even 100 per cent.—of the skilled craftsmen who may benefit under the orders will be members of the craft unions. But I cannot read section 6 (1) of the Act of 1927 as meaning that all employees of local or public authorities to which the section relates are to be placed in precisely the same position. The section cannot mean, for example, that unskilled labourers who do not belong to any trade union must be paid the same rate of wages as the skilled tradesman who belongs to

(1) [1896] 1 Q.B. 116. (2) [1896] A.C. 575.

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a craft union, nor do I think it can mean that such an unskilled labourer must be entitled to the same length of notice before he is dismissed as the skilled tradesman who claims to belong to a trade union, nor in my opinion can it preclude employers from drawing distinctions between employees of different degrees of skill even though some of them may belong to a particular trade union and others may not. The plaintiffs' real claim in the present proceedings is to obtain the declaration that they are entitled to equal treatment with apprentice-trained craftsmen, and an answer to question No. 3 to the effect that their dismissal was unlawful. The other declarations sought in the summons are really preparatory to these and without these the other declarations would be of only academic value. But even if it was held that section 6 of the Act of 1927 bound the plaintiffs' employers it is obvious that the Court would have to enter upon what might prove a very thorny line of inquiry before it could venture to make the declaration which the plaintiffs seek. The plaintiffs had served no regular apprenticeship to the engineering industry. The work on which they were engaged while they were in the Government service was a specialised form of engineering work, the maintenance of aircraft. There is no evidence before the Court as to the nature and extent of that work, whether it merely consisted of doing minor repairs and adjustments or whether it embraced all the types of engineering work which might fall to be carried out in a large aircraft factory. From paragraph three of Mr. Kennedy's second affidavit it appears to be work which an apprentice-trained fitter could learn to do in a few weeks. Nor have I any information with regard to the duration of the training courses which the plaintiffs went through or of the extent or width of the skill and experience to be gained in such courses as compared with the skill and experience ordinarily obtained by an apprentice-trained fitter during his apprenticeship. For aught I know the training of dilutees may have been almost altogether directed and confined to certain particular types of work upon which the Air Force authorities considered

that they could employ such men with advantage during the war, and may not have sought to give them the width of experience which an apprentice-trained fitter or aeronautical engineer would be expected to have. Of all this I know nothing. The matter has not been gone into before me. But it is a matter which in my view would have to be gone into before the Court could pronounce that such a declaration as that asked for in the summons should be made as a consequence of the provisions of section 6 of the Act of 1927.

And so far as I can see the matter would clearly appear to be one which could not be legitimately decided upon an Originating Summons. Accordingly, even if I had accepted the plaintiffs' contention that the provisions of section 6 of the Act of 1927 bound their employers I would have held that the questions which they have raised in the present proceedings were not questions proper to be determined on Originating Summons and would have declined to make in these proceedings the declarations which they seek, leaving them to bring an action if so advised.

Solicitor for the plaintiffs : *Eric Morrow.*
Solicitor for the defendants : *Chief Crown Solicitor.*

M.V.P.

K.B.D. 1946.

ROBINSON v. CHAMBERS (No. 2) (1).

Feb. 14, 18, 19, 25; Mar. 6.

Defamation—Reading a document aloud—Libel or slander.

The reading aloud of a defamatory document to a person other than the person defamed is the publication of a libel. *Forrester v. Tyrrell* (1893) 9 T.L.R. 257 followed.

ACTION tried by MacDermott J. without a jury.

The plaintiff was churchwarden and synodsman of the Parish Church of Glenavy, County Antrim, and the defendant was Rector of the Parish. On the 14th April, 1944, at the Easter meeting of the General Vestry, the defendant read aloud to those present at the meeting a letter which he had written to the Secretary of the Diocesan Council and in which he accused the plaintiff of "making collections in the "name of the Parish without reference to the Vestry, "and giving no account of the same." On the 17th April, 1944, the defendant sent this letter to the Secretary of the Diocesan Council.

The plaintiff brought this action for damages for libel and slander, complaining of two distinct publications, namely, the publication to the meeting on the 14th April, 1944, and the publication to the Secretary of the Diocesan Council on the 17th April, 1944. The publication to the meeting on the 14th April, 1944, was laid alternatively as the publication of a libel or the publication of a slander.

MacDermott J. held that the words were capable of defamatory meaning, namely, that the plaintiff had been guilty of fraudulent conversion, and that he was a dishonest and untrustworthy person, and that in the circumstances the publication to the meeting on the 14th April, 1944, was not privileged. He further held that the publication to the Secretary of the Diocesan Council on the 17th April, 1944, was not actionable as it was shown that this official did not regard the words complained of as defamatory of the plaintiff.

(1) In the King's Bench Division before MacDermott J.

In respect of the publication of the 14th April, 1944, the learned Judge awarded the plaintiff £10 damages.

The case is reported only on the question whether the publication of the 14th April, 1944, by reading aloud the letter to those present at the meeting was the publication of a libel or a slander.

Curran K.C., *Patton K.C.*, and *Gibson* for the plaintiff.

Porter K.C., *Sheil K.C.*, and *Hanna* for the defendant.

Cur. adv. vult.

MACDERMOTT J. delivered a written judgment from which the following passage dealing with the subject of this report is taken:

MACDERMOTT J.

The question is whether reading a defamatory document to any person other than the person defamed is the publication of a libel or a slander. It is a question of general importance for the reason, of course, that as our law stands the victim of slander has no redress (save in certain exceptional cases) without proof of special damage, whereas he who is libelled has his remedy irrespective of any such proof. For the defendant Mr. Sheil relied upon certain dicta—admittedly obiter—in the judgments of the Court of Appeal in England in *Osborn v. Boulter & Son* (1). Scrutton and Slesser L.JJ. both thought that the answer should be slander, while Greer L.J. took the other view. Scrutton L.J. referred to *John Lamb's Case* (2). The decision there and also in the anonymous *Case of Scandalous Libels* (3)—both Star Chamber cases—appears to be contrary to the view favoured by Scrutton L.J., who thought the text writers regarded such a communication as a slander. The Court, however, had not to decide the point and this may explain why the earlier decision of the English Court of Appeal in *Forrester v. Tyrrell* (4) was not cited. There the point fell to be decided, and Lord Esher M.R. (Bowen and A. L. Smith L.JJ. concurring) held that

(1) [1930] 2 K.B. 226.
(2) (1611) 9 Co. Rep. 59b.
(3) (1605) 5 Co. Rep. 125a.
(4) (1893) 9 T.L.R. 257.

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the Star Chamber cases had laid down "that if a man "read a libel on another to himself and then read it "out that made him a libeller." And he then added: "It would be strange if it were not so. What was so "laid down had been treated as clear law by books of "authority ever since." That was in 1893 when, with voice-recording in its infancy, broadcasting unknown and the printing press increasingly prolific, the capacity to injure of the written word so transcended that of what was merely spoken as still to justify a close observance of the distinction between libel and slander. Conditions to-day are very different and either view of the point under discussion can now show strange results. It may, for example, appear absurd that a defamatory broadcast should be actionable when made from a script or recording and not actionable otherwise. But is it any less absurd that a defamatory letter read to one person and afterwards given to another for the time taken by him to read it should not be actionable in the first instance but actionable in the second? The truth, I think, is that the reasons which sustained the distinction between libel and slander—in its origins a matter of historical accident—have now largely disappeared. But in this artificial and technical branch of our law the Courts are powerless to initiate a process of assimilation. There is no broad principle which can be applied to meet the changes which time has brought. That must be left to the Legislature. See the speech of Viscount Haldane in *Jones v. Jones* (1).

Such being the position I am of opinion that the law on this subject must be taken as it was accepted by the Court of Appeal in *Forrester v. Tyrrell* (2). See also Gatley on Libel and Slander, 3rd Edition, pages 5, 93 and 94. Accordingly, I hold that the publication to the meeting of the 14th April was a libel and actionable as such.

Judgment for plaintiff.

Solicitor for the plaintiff: *Wilfred S. Parke.*
Solicitors for the defendant: *W. G. Maginess & Son.*

J. McC.

(1) [1916] 2 A.C. 481, 489. (2) (1893) 9 T.L.R. 257.

PARK v. PARK AND McBRIDE (1).

K.B.D. (Matrimonial) 1946.

May 2, 16.

Divorce—Evidence—Statements by spouses tending to prove access or non-access—Application of Rule in Russell *v.* Russell.

The Rule in *Russell v. Russell* [1924] A.C. 687 which provides that neither spouse may give evidence of non-access after marriage to bastardize a child born in wedlock does not exclude evidence of admissions by a wife that she is with child by another where no evidence of non-access is given ; for such admissions in the absence of evidence of non-access are incapable of bastardizing the child.

Warren v. Warren [1925] P. 107 and *Roast v. Roast* [1938] P 8 approved.

The Rule in *Russell v. Russell* (supra) applies not only where the spouses are living together but also where they are separated either of their own volition or by decree or order of the Court. Where the spouses are living together or separated of their own volition a child born to the wife is presumed legitimate, but the husband may rebut this presumption by evidence other than his own. Where the spouses are separated by decree or order of the Court a child born to the wife at such date that it must have been conceived after the date of the decree or order is presumed bastard, but the wife may rebut this presumption by evidence other than her own.

Ettenfield v. Ettenfield [1940] P. 96 approved.

The Rule in *Russell v. Russell* (supra) does not exclude evidence by either spouse of non-access in order to rebut a defence of condonation, but such evidence can only be admitted on that issue and is not therefore available on the issue of adultery.

PETITION for divorce by a husband against his wife on the ground of adultery.

The facts sufficiently appear from the judgment.

Weatherup for the petitioner.

McVeigh for the co-respondent.

There was no appearance for the respondent.

Cur. adv. vult.

(1) In the King's Bench Division (Matrimonial) before Andrews L.C.J.

K.B.D. (Matrimonial) 1946.

PARK v. PARK AND McBRIDE.

ANDREWS L.C.J.

ANDREWS L.C.J. : In this cause, which is brought for dissolution of marriage grounded upon the alleged adultery of the respondent with the co-respondent, McBride, certain questions arose upon which I felt it would be desirable to give a considered judgment in order that any doubts which might exist in regard to the practice and procedure of this Court in such cases might be removed.

The relevant facts of the case fall within a narrow compass and may be briefly stated. Married on 26th December, 1940, the petitioner states that his wife left him on 11th July, 1943, and that the efforts which he made immediately afterwards towards a reconciliation failed. A bus driver by occupation, he resided between January, 1944, and January, 1945, in lodgings at Whitehead, in company with a man named Maurice Gray who followed the same calling. The respondent resided during this time with her father at Whiteabbey —some eleven miles distant. It was proved to my complete satisfaction by Mrs. Sarah J. Gilmour, a State certified midwife, that on 15th May, 1945, the respondent was delivered of a male child, the paternity of which is in dispute. Intercourse at the time of the conception of this child is the only act of adultery relied upon. I came to the clear conclusion at the hearing that there was no sufficient evidence upon which I could find against the co-respondent McBride, and I, accordingly, dismissed him from the suit. The proceedings were not defended by the respondent.

The questions upon which I reserved my judgment arose in consequence of the rule of law which it was established by the House of Lords in *Russell v. Russell* (1) applied to divorce proceedings grounded upon alleged adultery. This rule of law, which was stated by Lord Mansfield in *Goodright's case* (2) to be that the declaration of a father or mother cannot be admitted to bastardize the issue born after the marriage, had always been recognised in legitimacy proceedings. It was, as the learned Lord said, a rule founded on decency, morality, and policy, "that they" (i.e., the spouses) "should not be permitted to say after

(1) [1924] A.C. 687. (2) (1777) 2 Cowp. 591.

"marriage, that they have had no connection, and "therefore that the offspring is spurious." It was, in truth, a rule or principle of law which protected the sanctity of married intercourse. The Earl of Birkenhead expressed the same view when he pointed out in *Russell v. Russell* (1) that it rested not on the ground merely that the giving of such testimony was calculated to promote dissension between husband and wife, but on the broader ground of general public policy affecting the children born during the marriage as well as the parties themselves. In these circumstances the House, by a majority of three to two, held that the rule had a general application, and that it applied to proceedings instituted in consequence of alleged adultery, so that no evidence by either husband or wife of non-intercourse after marriage is permitted to bastardize a child born in wedlock. To the like effect was the opinion of Lord Finlay (2) when he said that proof of non-access cannot be given by either the husband or the wife for the purpose of rebutting the strong presumption that the child of a married woman was begotten by her husband. Neither of them can be asked any question tending to prove such non-access; it must be established entirely by the evidence of other witnesses.

This decision revolutionised the previously established practice of the English Courts in divorce suits under which decrees were pronounced, especially after the world-war of 1914-18, on the evidence of husbands whose wives had given birth to children, of whom, owing to their non-access, they could not have been the fathers. Such cases were simply proved by the petitioner being asked: "When did you last have "intercourse with your wife?" and by the proof of the birth of a child outside the period of gestation from the date of such last intercourse. Such method of proof is no longer admissible. *Russell v. Russell* (1), however, fully recognises the admissibility of evidence of non-access if given *aliunde*.

Such is the general rule established in *Russell v. Russell* (1), but it is a rule which of course has its

(1) [1924] A.C. 687. (2) *ibid.* 705-6.

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limitations. Thus Lord Dunedin in *Russell v. Russell* (1) itself, after stressing that the whole point of Lord Mansfield's dictum rests on the concluding words "and to make the issue spurious," states emphatically that it is when conjugal conduct is used, not as a thing in itself, but as leading to other inferences that the harm comes in. "No proof of conduct or "want of conduct," he continues, "which shows "nullity, no proof of cruelty, such as communicating "venereal disease, no proof of connection such as in "itself is condonation, has the remotest reference to "the point of legitimacy of issue. The evidences of "the spouses in these cases is the only evidence avail- "able to the direct fact in issue, and has in the giving "of it no evil consequences."

The limitations of *Russell v. Russell* (1) were further illustrated in the following year by the important decision of Swift J. in *Warren v. Warren* (2), the authority of which has never since been questioned. It has, indeed, been expressly approved of by Sir Boyd Merriman in *Roast v. Roast* (3), and by Goddard L.J. in *Ettenfield v. Ettenfield* (4). In *Warren v. Warren* (2), the wife confessed to her husband that she had committed adultery during a brief absence from her husband and was pregnant in consequence. The wife subsequently registered the birth of the child without naming a father. The only evidence of adultery was the wife's confession, verbal and in certain letters, always coupled with the assertion that the adultery resulted in the birth of the child. No evidence was given at the trial of non-access, or non-possibility of access, of the husband during the period within which the child must have been conceived; and in such circumstances it was held that the wife's admission could not in law bastardize the child, and that it was therefore admissible. The underlying principle of the decision is that which was expressed by Alderson J. in *Cope v. Cope* (5), that "if once you are satisfied that

(1) [1924] A.C. 687.
(2) [1925] P. 107.
(3) [1938] P. 8, 16.
(4) [1940] P. 96, 103.
(5) (1833) 1 Moo & Rob. 269, 276.

"the husband had sexual intercourse with his wife, the "presumption of legitimacy is not to be rebutted by "its being shown that other men also had sexual "intercourse with the woman. The law will not, "under such circumstances, allow a balance of the "evidence as to who is most likely to have been the "father." The presumption of legitimacy is, however, as was pointed out, merely a presumption which may be rebutted by evidence of non-access, given not by either spouse, for that is inadmissible, but by the independent testimony of other witnesses. No such evidence was given in *Warren v. Warren* (1), and it was in these circumstances that Swift J. said (at p. 112) that he could find no authority for saying that a statement made or evidence given by a wife to the effect that whilst her husband had access to her, and whilst presumably he was having intercourse with her, she committed adultery, is to be excluded. However many men may have had connection with a wife nothing can bastardize the child unless and until non-access of or non-intercourse by the husband has been proved by admissible evidence.

In Rimmer v. Rimmer (reported as a footnote to *Hadlow v. Hadlow* (2)), the King's Proctor had intervened and appeared to show cause why a decree nisi should not be made absolute. After referring to an admission by the wife, afterwards retracted, as the only admissible evidence against her, Hill J. stated that the King's Proctor had tendered in evidence a statutory declaration made by the wife preceding a rectification of the birth register deleting the husband's name as father of the child. Any statement, he said, by the wife in the original registration that the husband was not the father would not have been admissible in evidence. Her actual declaration was inadmissible. It had been contended, the learned Judge said, that he could admit that declaration as a confession of adultery and reject it as a declaration of paternity under the authority of *Warren v. Warren* (1), but if he rejected all that related to the paternity of the child he had nothing left in the declaration for rectification

(1) [1925] P. 107. (2) (1930) 46 T.L.R. 624.

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except certain words into which he could not read an admission of adultery.

Roast v. Roast (1) was an appeal from a Court of Summary Jurisdiction which had dismissed a summons, brought by the wife against her husband, in which she alleged desertion. The husband pleaded reasonable cause for leaving his wife. The husband's case was that he left his wife because she stated that a child with which she was pregnant would have to be kept by him whether it was his or not. No attempt was made to negative access at any material time. In these circumstances the Court, consisting of the President (Sir Boyd Merriman) and Bucknill J., held that the statement of the wife, though amounting to a doubt with reference to the paternity of the child, was not an attempt by her to bastardize the child so as to be inadmissible in evidence under the rule in *Russell v. Russell* (2), but was an admission that at a material time a man other than her husband had had intercourse with her, and was therefore admissible on the authority of *Warren v. Warren* (3) as evidence that the husband had reasonable grounds for leaving his wife. So admitted the words constituted in the opinion of the Court an admission of adultery; for it did not matter whether the form of words used were an express admission of the commission of adultery, or whether that was a necessary inference from what was said.

This case was followed by an important decision of the Court of Appeal in *Ettenfield v. Ettenfield* (4)—important for our present purposes because it recognises the authority of *Warren v. Warren* (3), and important also because it altered the law as established in such cases as *Mart v. Mart* (5), and *Stafford v. Kidd* (6), and laid it down as the opinion of the whole Court that the rule recognised in *Russell v. Russell* (2) was absolute, and that it applied not only when the parties are living together, but when they are separated either by a decree or order of a court of competent jurisdiction or by their own volition. The presump-

(1) [1938] P. 8.
(2) [1924] A.C. 687.
(3) [1925] P. 107.
(4) [1940] P. 96.
(5) [1926] P. 24.
(6) [1937] 1 K.B. 395.

tions, however, are different in these cases. Where the parties are separated by a decree or order of a court of competent jurisdiction and the child must have been conceived after the date of the decree or order, there is a *presumptio juris* that it is a bastard—a presumption which the wife may rebut if she can, though only by evidence other than her own. But where the parties are living together or are separated by their own volition the presumption is that the child is legitimate, though it is competent for the husband to rebut this presumption by evidence of non-access other than his own evidence.

Mr. Weatherup, in support of his argument for the petitioner, referred me to the decision of Hodson J. in *Frampton v. Frampton and Bushell* (1). This case is useful as an illustration of an admission of pregnancy by another man being held admissible in evidence, where there was no evidence of non-access by the husband; but the case need not be further examined as it neither extends nor limits the decisions of the Courts in *Warren v. Warren* (2) and *Roast v. Roast* (3) to which I have already referred.

Finally, I would refer to *Glenister v. Glenister* (4) merely for the purpose of citing Lord Merriman's opinion, with which I unhesitatingly and respectfully concur, that evidence properly admitted on the issue of condonation cannot be used in defiance of the rule in *Russell v. Russell* (5). In other words, because it was given legitimately it cannot be used illegitimately.

Such, then, is the state of the law as established in England in regard to the admissibility of statements amounting to admissions of adultery and affecting the legitimacy of a child born during wedlock. I accept it as the law also in Northern Ireland. Its application to the facts of the present case, which alone remains to be considered, does not appear to me to admit of any doubt, or to involve any special difficulty.

The evidence adduced by the petitioner may be classified under three heads. First, there is his own evidence of his residence in Whitehead from January,

(1) [1941] P. 24.
(2) [1925] P. 107.
(3) [1938] P. 8.
(4) [1945] P. 30.
(5) [1924] A.C. 687.

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1944, to January, 1945—a period which necessarily covered the date of conception of the child born on 15th May, 1945. This evidence, accompanied, as it was, by the statement that he did not sleep at any other place than Whitehead during that time, was obviously directed to non-access. Such evidence clearly violated the rule in *Russell v. Russell* (1) and must be rejected as quite inadmissible. Even if it were suggested that the evidence was directed towards proof of non-condonation of the matrimonial offence which the respondent had committed in leaving her husband, *Glenister v. Glenister* (2), in my opinion conclusively establishes that, though properly admitted on that issue, it could not be relied upon in support of non-access and therefore of adultery. Were the law otherwise nothing would remain of *Russell v. Russell* (1), except its funeral obsequies, at which, it is true, however correct the decision may have been, there might not be a large concourse of legal mourners.

Secondly, there is the evidence of Mrs. Gilmour, the midwife. Such evidence, in so far as it related to the fact that the respondent gave birth to a child on 15th May, 1945, was properly receivable; but her conversation with the respondent, during which the latter said that she did not want her husband's name put down in the registration as he was not the father, fully supported by the certificate of birth produced before me, in which the name of the father is left blank, clearly also offends against the rule in *Russell v. Russell* (1) by reason of the evidence of non-access which the petitioner adduced. It emanated from one of the spouses; and, if accepted, it would necessarily have the effect of bastardizing the child.

Thirdly, there is the evidence of non-access given by Maurice Gray. The question in regard to his testimony is not as to its admissibility but as to its weight. As a fellow-bus driver he had lodged with the petitioner at a Miss Martin's, of Whitehead, during the whole of the January, 1944, to January, 1945, period. They were often in each other's company, and occupied and slept together in the same room. He declared most positively that never during the

(1) [1924] A.C. 687. (2) [1945] P. 30.

whole of that year did either of them sleep a single night anywhere else than in these lodgings ; and never during that period did he see the respondent there. Proofs would have been strengthened by the production of Miss Martin to give corroborative testimony ; but unfortunately she was unwell and could not come to Court. I believed Gray to be an honest and credible witness, and I accept his testimony as far as it goes. It obviously is not conclusive, for Gray did not spend much of the days in the petitioner's company. But these were the hours when their time would be fully occupied in the discharge of their duties as bus drivers. I think I am also entitled in weighing Gray's evidence and in considering the measure of credence to be attached to it to have regard to the very strained relations which had existed between the petitioner and respondent prior to her finally leaving him on 11th July, 1943. The strong probabilities of the case clearly confirm his testimony. In holding, as I therefore do, his evidence to be sufficient for the purpose of establishing non-access, I am glad to find that in *Hadlow v. Hadlow* (1) Hill J. arrived at the same conclusion on evidence which, as the case is reported, does not appear to have been in any way more convincing or conclusive than is the evidence in the present case. In *Hadlow v. Hadlow* (1) both parties continued to live in London after they had separated ; yet the Court accepted as evidence of non-access the evidence of the petitioner's father that the petitioner had been living with him during the material period and had not slept away one night. Hill J. concluded his judgment by saying : " I know not how else a working man is to " prove non-access than by evidence such as this. " I hold that it is sufficient. I find adultery."

I have only to say that I concur in general terms with the view thus expressed ; and I also make a decree nisi on the ground of adultery by the respondent with some person unknown. There will be no order as to costs.

Solicitors for the petitioner : *John G. H. Wilson & Co.*
Solicitors for the co-respondent : *Wm. Harper & Co.*

(1) (1930) 46 T.L.R. 624.

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ADAMS v. BELFAST CORPORATION (1).

June 4, 5, 18.

Master and servant—Common employment—Tram conductor injured by negligence of driver of another tram—Both vehicles units in one transport system—Liability of employer.

The plaintiff, a tram conductor employed by the defendant Corporation, was injured when a tram on which he was performing his duties was run into on the highway by another tram negligently driven by K. who was employed by the defendant Corporation as a tram driver. The two trams, which were units in the defendant Corporation's transport service, were based on different depots, but at the time of the collision both trams had been directed to the same area for relief duty in connection with heavy traffic of workmen proceeding to work. In an action for damages for personal injuries the defendant Corporation pleaded the defence of common employment.

Held, that as the plaintiff and K. were concerned in the operation of vehicles which were units in the same system of transport and which were at the time of the accident engaged in the discharge of a particular duty which brought them into proximity with one another, they were in common employment and the action failed.

Metcalfe v. London Passenger Transport Board (1939) 55 T.L.R. 700 not followed.

ACTION tried by Andrews L.C.J. without a jury.

The facts sufficiently appear from the judgment.

Nicholson K.C. and *McQuitty* for the plaintiff.

Curran K.C. and *McVeigh* for the defendant Corporation.

Cur. Adv. Vult.

ANDREWS L.C.J.

ANDREWS L.C.J.: The plaintiff in this case was in the employment of the defendants as a tram conductor, when, on 12th January, 1945, he met with an accident caused by the alleged negligence of the defendants and their servants, in the driving, management and control of a tramcar which collided with the tramcar upon which at the time the plaintiff was acting in the lawful discharge of his duty as conductor.

(1) In the King's Bench Division before Andrews L.C.J.

The accident occurred about 9-15 a.m. at the top of Station Street, where the tramcar, on the rere platform of which the plaintiff was standing, was stopped by a policeman on point duty. Whilst so stationary another tramcar belonging to the defendants, and driven by a man called Kennedy, without warning drove into the back of the plaintiff's tramcar. The plaintiff was knocked down by the force of the collision which caused one of the control handles to fly round, and he sustained injuries to his back, as the alleged result of which he has been unable since to resume his work. There was of course clear *prima facie* evidence of negligence; and, as the defendants called no witnesses, I have no hesitation in holding that the accident was caused by the negligence of the defendants' driver Kennedy, and that the plea of contributory negligence also fails. The plea of election by the plaintiff to accept compensation under the Workmen's Compensation Acts was not argued, having regard to the plaintiff's evidence and to recent authority both in the House of Lords and in this Court. (See *Young v. Bristol Aeroplane Co. Ltd.* (1), and *Moran v. Howard & Co. Ltd.* (2).)

In these circumstances the defence was limited entirely to the legal submission of common employment—that the plaintiff and Kennedy, whose negligence caused the accident, were fellow-servants of the defendants, and were at the time engaged in a common work in the course of such employment. Before considering this legal issue it is necessary to set out the material facts which I hold to have been established.

The plaintiff was in the employment of the defendants as such conductor for a period of over three years. After spending the first few months at their Mountpottinger depot he was transferred to the Knock depot, where he was still stationed on the day of the accident. Such matters are arranged at the defendants' Head Office in Sandy Row, from which there also issue instructions to the various depots in regard to routes to be followed, numbers of trams required, and times of service. It is there that the highest or ultimate

(1) [1946] A.C. 163. (2) [1945] N.I. 131.

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control of all bus and tram traffic in the City is exercised. Particular drivers and conductors are apparently generally associated together in their work, but the tramcar on which they serve on any particular day is determined for them by other officials. A Mr. Forbes was in charge of the Knock depot. A list containing the requisites of the week's service is posted in the beginning of the week at the Knock depot. It contains particulars in regard to times and journeys, but it does not prescribe the particular cars for the respective journeys. This is determined by the night foreman, Moore, who takes charge of the cars leaving the depot. Apparently a similar practice prevails at Mountpottinger depot, where arrangements are made and carried out independently of Knock depot. If one of the depots, e.g., Knock, requires an extra car a request for this purpose can be made by telephone to the nearest depot to provide a car without reference to Head Office. To this extent at least depots all work together. Some weeks the plaintiff's journeys varied—work technically called "spreads"; other weeks he and his driver would have fixed journeys on the one route for their eight-hour day. On the day of the accident the plaintiff was assigned with his driver Collins to car No. 132. He left the depot at seven a.m. for a run to Balmoral. It was a "spread" week. Apparently two such journeys to Balmoral and back had been prescribed; but, after one journey only had been completed, the driver and conductor received instructions when they reached the Central Box at Castle Junction to turn back on their journey in order to take workmen to the Queen's Road. They did so, and it was when on the return journey from Queen's Road that the accident happened. The plaintiff's tramcar was at the time empty, and was proceeding to the depot at Knock. The driver of the other car, Kennedy, was unknown to the plaintiff at the time of the accident as he was stationed at the Mountpottinger depot. The plaintiff had, however, sometimes seen this other tramcar (No. 17) when on duty in Queen's Road. At the time of the accident this car, which belonged to Mountpottinger depot, was also engaged

with apparently several others on the same special workmen's relief duty as was the plaintiff's car.

These are the material facts upon which the legal issue of common employment relied upon by the defendants must be determined. It is a doctrine of which many unkind things have been said in recent years. Lord Wright referred to it in *Wilson & Clyde Coal Co. v. English* (1) as the well-established, but illogical, doctrine of common employment which was certainly not to be extended. Lord Atkin spoke of it in *Radcliffe v. Ribble Motor Services Ltd.* (2), as a doctrine which at the present time is looked at askance by judges and text-book writers; yet it is too well established to be overthrown by judicial decision. In the Scottish case of *Kerr v. Corporation of Glasgow* (3), Lord Jamieson called it an "anachronism in the "present day conditions of industry," but also spoke of it as "firmly embedded in our law." Thus, whilst many eminent legal jurists would welcome a legislative change which would better conform to modern conditions, recent high authority has not only recognised but has re-affirmed the doctrine, the origin of which may be traced to the Court of Exchequer in *Priestley v. Fowler* (4). Though various bases have been assigned for its existence that which is most generally, and in my opinion most properly, accepted is implied agreement; and perhaps the doctrine itself and the true ground for its existence are most happily combined in the words of Alderson B. in *Hutchinson v. York Newcastle Berwick Rly Co.* (5). "The principle," he there says, "is, that a servant, when he engages to "serve a master, undertakes, as between himself and "his master, to run all the ordinary risks of the "service; and this includes the risk of negligence on "the part of a fellow-servant, whenever he is acting "in discharge of his duty as servant of him who is the "common master of both."

"Ordinary risks" and "common service" are the outstanding and essential features of this and any

(1) [1938] A.C. 57, 79.
(2) [1939] A.C. 215, 223.
(3) [1945] S.C. 335, 351.
(4) (1837) 3 M. & W. 1.
(5) (1850) 5 Ex. 343, 352.

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other true definition of common employment. Their co-existence must be established by evidence before the plea of common employment can be held good. This does not mean that both workmen must be engaged in performing the same or similar acts. Neither does it mean that a workman should be expected to anticipate risks which may happen to him on occasions which Lord Chelmsford in *Bartonshill Coal Co. v. McGuire* (1), referred to as "foreign to his "employment." They must be "natural risks and "perils incident to the performance of the services." It does, however, involve the necessity for the two servants working with one common object. This necessity has led to the use of certain judicial phrases such as that "the service of each employee must "bring them both to work in the same place and at "the same time"; or that it must "bring the em- "ployees into association with each other in carrying "on some activity in common"; or that their work necessarily and naturally or in its usual course brought them into "juxtaposition" with one another; or that they were working in a "common operation," or in "one department of duty." Such expressions as these may, I think, be accepted at least as lights to guide one along the path of enquiry as to the establishment or non-establishment of the plea of common employment.

Having thus enunciated the principles upon which the Courts have acted in some of the older cases of accepted authority, I turn almost with trepidation to the more recent cases in the English and Scottish Courts commencing with the decision of the House of Lords in *Radcliffe v. Ribble Motor Services Ltd.* (2). These cases, all but one of which relate to street accidents, include *Metcalfe v. London Passenger Transport Board* (3), *Murray v. Edinburgh Corporation* (4), *Kerr v. Glasgow Corporation* (5), *Miller v. Corporation of Glasgow* (6), and *Bruce v. Pantrini & Others* (7). I have carefully read all the judgments in these cases

(1) (1858) 3 Macq. 300, 307.
(2) [1939] A.C. 215.
(3) (1939) 55 T.L.R. 700.
(4) [1941] Sess. Notes 14.
(5) [1945] S.C. 335.
(6) [1946] S.L.T. 173.
(7) Unreported.

to which I shall refer as briefly as their importance will permit.

In the first place, I would wish to say very clearly and emphatically that I regard *Radcliffe v. Ribble Motor Services Ltd.* (1) as a decision upon its special facts, and not as intended to lay down any general propositions applicable to all street accident cases in which the injured and the negligent parties are both in the common employment of a public tramway or omnibus service. Its real value lies in its authoritative review of the earlier cases from the birth of the doctrine in 1836. All the learned Law Lords based their opinions largely upon the judgment of Sir Francis Jeune P. in *The Petrel* (2), in which a collision had occurred in the Thames between two steamers, the *Petrel* and the *Cormorant*, both belonging to the same owners, owing to the admitted negligence of those navigating the *Petrel*. The collision resulted in the sinking of the *Cormorant*. In a suit for limitation of liability the claim of the master, officers and crew of the *Cormorant* for loss of their effects, which was disputed on the ground of common employment, Sir Francis Jeune P. held that the doctrine did not apply. *Radcliffe's case* (1), on its general facts was, indeed, very similar, the most material difference perhaps being that it related to an accident on land, whilst the *Petrel* (2) related to an accident at sea. This circumstance, however, could not and did not affect the application of the doctrine of common employment. I must repeat, however, that, as was most explicitly stated by Lord Wright, *Radcliffe's case* (3) was a decision on its special facts—the buses at the time of the accident were on a separate enterprise, the hire had been finished, the drivers had received independent instructions for independent operations, and were entrusted with full discretion as to the route they should select on their return journey during which the accident occurred. It was "a mere chance" that the buses came together. "There was no evidence," said Lord Wright (4), "of any compulsion or order of

(1) [1939] A.C. 215.
(2) [1893] P. 320.
(3) [1939] A.C. 215, 254.
(4) *ibid.* 252.

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"the employer which brought these two men together "at that time and place. The concurrence of their "courses was fortuitous." Speaking, accordingly, of that particular period of time, Lord Atkin said (1) that "in regard to driving in the streets of Liverpool the "one was no more interested in the skill of the other "than in that of the drivers of the myriads of other "vehicles in whose vicinity he might happen to drive." In such special circumstances it was held that it was impossible to regard the immunity of the employers from responsibility for injury resulting in death to one of the drivers caused by the negligence of the other driver as an implied term of the contract of employment.

Metcalfe's case (2)—a decision of the English Court of Appeal which never found its way into the official reports—I regard as an extremely doubtful application of the decision in *Radcliffe's case* (3) to a wholly different state of facts. In so far as it conflicts, as I think it necessarily does, with the later Scottish cases, I prefer and accept the latter as more consistent with what I conceive to be sound legal principle. There may have been other grounds (see p. 703) upon which the decision might have been justified ; but I do not think that the doctrine of common employment should have been excluded merely because of the fact that the plaintiff, who was a bus conductor injured by the negligence of a tramway car driver in the same employment, was at the particular place where the accident occurred "exposed to the general risks of a public thoroughfare." The learned Master of the Rolls (Sir Wilfred Greene as he then was), basing his judgment on this ground, said that it seemed to him that "the risks which were "being run were the risks of the high road, and none "the less so because the other employees of the com- "pany who were conducting other omnibuses or "tramway-cars were proceeding according to some "definite route or some definite time-table or both."

The limitations of *Radcliffe's case* (3) to some of which I have already referred, were pointed out by

(1) [1939] A.C. 215, 231-2.
(2) (1939) 55 T.L.R. 700.
(3) [1939] A.C. 215.

Lord Mackay in *Kerr v. Glasgow Corporation* (1), but the facts differed materially from those of the present case, and I accordingly pass over it to the case of *Miller v. Corporation of Glasgow* (2), the facts of which appear to me very closely to resemble the present case. There the two vehicles were electric trams, only capable of running on fixed rails. They were operating on the same route, maintaining a shuttle service to a fixed time table. On the day of the accident they were next in sequence to one another. The immediate cause of the collision was a blow-out of a fuse in the leading car as it ascended a hill, and the failure of the driver to apply his brakes in time. The pursuer, who was the conductress of the second tramcar, was, like the driver of the first tramcar, in the employment of the defendants. It is true that in one respect, which in my opinion is immaterial, *Miller's case* (2) differed from that now under consideration, namely, that both tramcars were attached to the same depot. Lord Patrick, the Lord Ordinary, held in favour of the pursuer, expressing the opinion, based largely on the decision in *Metcalfe's case* (3), that the doctrine of common employment had no application to cases arising out of such "collisions on the high seas or the "high road." The reclaiming motion (as it is styled) was allowed by the Second Division. I quote a very important and helpful passage from the judgment of the Lord Justice Clerk (Lord Cooper). "I cannot," he says, "accept the suggestion implicit in the pursuer's "argument that *Radcliffe* (4) was a case in which "the doctrine of common employment was severely "curtailed in its ambit and largely discredited. On "the contrary, I read it as a decision in which, not-"withstanding a generally expressed desire to see the "doctrine consigned to a decent oblivion, the House "of Lords felt obliged to recognise it as an integral part "of the law of reparation, and to reformulate it and "its limitations anew on the basis of many earlier and "authoritative decisions. Equally I cannot read "*Radcliffe* (4) as an authority for the pursuer's

(1) [1945] S.C. 335.
(2) [1946] S.L.T. 173.
(3) (1939) 55 T.L.R. 700.
(4) [1939] A.C.215.

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"proposition that common employment affords no "defence in cases of traffic accidents on public roads. "If the *ratio decidendi* had been capable of statement "in so simple a generalised formula, the House of "Lords would have said so, instead of expounding the "effect and limitations of the doctrine in its application "to such a traffic accident in thirty-eight pages of "print. All the learned Lords were at pains to stress "the special features of the case." These features the learned Lord Justice Clerk proceeded to set out with much greater particularity than I have already done in this judgment, concluding the paragraph with the significant and, in my opinion, fully justified words: "Indeed, it is possible on the reasoning in *Radcliffe* (1) "that if the identical accident had occurred in the "outward journey (when the coaches were running in "convoy) and not on the return journey (when they "were running independently) the decision might "have been to the opposite effect."

Miller's case (2) was followed by Lord Sorn in *Bruce v. Pantrini and others* (3)—a case in which a bus on which the pursuer was conductress was run into from behind by another bus, both buses belonging to the Corporation of Glasgow who defended the action. It was proved that the Corporation through its transport department operate a network of bus services throughout the City. The two buses were engaged on separate service routes, but both passed in the ordinary course through the centre of the City, and there was in a measure an overlapping of routes in the transport system of the City generally. Buses for both number 19 and number 2 services were supplied from one garage, but crews were not permanently allocated to these routes, drivers and conductors being interchangeable between the various city services. In these circumstances Lord Sorn held that not only did the driver and conductress serve the same master, but also that the bad driving by the driver was a risk incidental to the pursuer's employment. As in *Miller's case* (2) so also in the case before him, Lord Sorn

(1) [1939] A.C. 215.
(2) [1946] S.L.T. 173.
(3) Unreported.

considered that the pursuer's vehicle was a unit in a regular system of transport. In both cases the system necessarily resulted in that unit being brought into regular association with other units which were a potential source of danger to it. "The only differ- "ence," he added, "between the cases seems to be "that trams run on lines and buses do not, and I "cannot see how any true distinction can be based "on that difference."

I respectfully adopt the reasoning in these Scottish cases, and I apply their conclusions to the facts of the present case in which the two tramcars in collision were engaged as units in a regular system of city transport in the discharge of a common passenger relief duty which brought them into proximity with one another—a proximity which might at any time become dangerous if the tramcars were driven or controlled in a negligent manner. Their meeting was not, as in *Radcliffe's case* (1) a "mere chance" or a "quite fortuitous" circumstance, but it was the result of orders legitimately and properly given by superior authority. It is in these circumstances that I am not affected by the fact that the tramcars and those in charge of them were stationed at different depots. All were bound as on this occasion to conform to such orders.

Lord Wright, in a passage in *Metcalfe's case* (2) which was strongly relied upon by plaintiffs' counsel, Mr. Nicholson, deprecated refinement in cases of this nature, such as that other employees of the company who were conducting other omnibuses or tramway cars were proceeding according to some definite route or some definite time table or both. The "governing "consideration" in his opinion simply was that the risks that were being run were "the risks of the high "road." With the greatest respect I feel that refinement will be at least as much introduced if attempt is made to apply one principle universally to accidents whilst the cars are in the depot, and another when they are on the high road. What I would ask would be the legal position if accidents of this character occurred

(1) [1939] A.C. 215. (2) (1939) 55 T.L.R. 700.

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whilst the tramcars were just emerging from the depot, or when they had only proceeded a very short distance along the street rails and were still in close proximity to or "juxtaposition" with one another? In a word, I am unable to generalise from *Radcliffe's case* (1) in the manner in which, as it would appear from the only report available, the Court of Appeal did in *Metcalfe's case* (2).

In my opinion on the facts proved in this case the accident was caused to the plaintiff by the negligent act of a fellow servant engaged in a common employment. Though it happened in the public street it was none the less an ordinary and natural risk incidental (not accidental) to the plaintiff's service—a service which from its very nature was largely to be performed in the public street, and one, accordingly, which the plaintiff must be assumed to have contemplated, and tacitly or impliedly assented to encounter in his contract of employment. I accordingly dismiss the action with costs; but in view of the possibility of an appeal I assess the damages to which in my opinion the plaintiff, if successful, would be reasonably entitled at the sum of £500.

Judgment for defendants.

Solicitors for the plaintiff: *N. & F. Tughan.*
Solicitors for the defendant: *the Town Solicitor.*

(1) [1939] A.C. 215. (2) (1939) 55 T.L.R. 700.

J. McC.

REX (DIAMOND AND FLEMING) *v.* WARNOCK (1)

K.B.D. (Crown Side) 1946.

May 17

Mandamus—Prisoner on hunger strike—Applications on behalf of Member of Parliament and prisoner's sister—Interest—Directed to Minister of Home Affairs—Improperly directed—Prisoners (Temporary Discharge for Ill-health) Act, 1913 (3 *Geo.* 5, *c.* 4), *section* 1—*Government of Ireland Act,* 1920 (10 & 11 *Geo.* 5, *c.* 67), *section* 8—*Irish Free State (Consequential Provisions) Act,* 1922 (13 *Geo.* 5, *Session* 2, *c.* 2), *First Schedule.*

A convict serving a sentence of penal servitude for treason-felony went on hunger strike. On a motion made on behalf of a Member of Parliament and the sister of the convict for a writ of mandamus directed to the Minister of Home Affairs for Northern Ireland ordering him to release the convict forthwith in the exercise of his powers under the Prisoners (Temporary Discharge for Ill-health) Act, 1913,

Held, that the application must be refused because:

(1) neither applicant had a *locus standi* to move for the issue of the writ;

(2) the writ of mandamus does not issue against a Minister of the Crown;

(3) the Act of 1913 is not imperious or manadatory, and the power given by that Act is purely discretionary;

(4) the power under the Act of 1913 is vested not in the Minister but in the Governor of Northern Ireland, and accordingly the writ which was sought would be directed to the wrong person.

MOTION on behalf of Henry Diamond, M.P., and Nellie Fleming, for a writ of mandamus directed to the Rt. Hon. Edmond Warnock, Minister of Home Affairs, Northern Ireland, directing him to release forthwith David Fleming, a prisoner in the Belfast Gaol, in the exercise of the powers vested in him by virtue of section 1 (1) of the Prisoners (Temporary Discharge for Ill-health) Act, 1913.

From the Affidavits of Henry Diamond, M.P., Nellie Fleming, and Thomas Moore Stuart, the following facts appeared :—

David Fleming was convicted of treason-felony

(1) In the King's Bench Division (Crown Side) before Andrews L.C.J. and Black J.

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and sentenced to twelve years penal servitude by the Court of the Belfast City Commission on the 25th November, 1942. On the 21st March, 1946, David Fleming gave notice in writing to Thomas Moore Stuart, the Governor of Belfast Prison, that he, David Fleming, intended to fast from all food and drink except water until his demand for political treatment was complied with. The prisoner was forcibly fed on the 10th April, 1946, but he again went on hunger strike on the 14th April, 1946, in order to gain official recognition as a political prisoner or release from custody. Nellie Fleming, sister of the prisoner, applied to the Governor of the Prison for permission which was granted for a Mrs. McCurtain McNamara, Solicitor, of Cork, Eire, to interview the prisoner. No application was made by the prisoner to see any solicitor, except Mrs. McNamara.

Henry Diamond, a Member of Parliament for Northern Ireland (Falls Division) sent a letter, dated 14th May, 1946, to the Minister of Home Affairs demanding on behalf of the family of David Fleming and on behalf of his constituency the exercise of the powers of the Minister to order the release of David Fleming under the Prisoners (Temporary Discharge for Ill-health) Act, 1913.

The affidavits of Mr. Diamond, M.P., and Miss Fleming, were sworn on the 14th May, 1946, and stated that the prisoner was then on his fifty-fourth day of hunger strike and was physically unfit to serve the remaining portion of his sentence.

When the case was called on the Lord Chief Justice remarked that there appeared to be a number of irregularities in the application, and in particular that the customary procedure by way of application for a rule nisi had not been adopted, nor had any leave to serve short notice of motion been obtained; but the Attorney-General who was in court consented to waive all informalities in procedure and the hearing of the motion proceeded.

A. Lynn for the applicants :—

Section 1 (1) of the Prisoners (Temporary Discharge for Ill-health) Act, 1913, provides that " If the Secretary

"of State is satisfied that by reason of the condition "of a prisoner's health it is undesirable to detain him "in prison, but that, such condition of health being "due in whole or in part to the prisoner's own conduct "in prison, it is desirable that his release should be "temporary and conditional only, the Secretary of "State may, if he thinks fit, having regard to all the "circumstances of the case, by order authorise the "temporary discharge of the prisoner for such period "and subject to such conditions as may be stated in "the order." Section 3 of this Act provides that reference to the Secretary of State shall in Ireland be construed as reference to the Lord Lieutenant The effect of the Government of Ireland Act, 1920, section 8, and the Irish Free State (Consequential Provisions) Act, 1922, Session 2, appears to be that the Minister of Home Affairs in Northern Ireland has powers and duties analogous to those of the Secretary of State for the Home Department in England. One such duty is the general supervision of prisons. Prior to the 1913 Act it was and still is the common law duty of prison authorities to preserve the life and health of prisoners: *Leigh v. Gladstone* (1). Apart from the 1913 Act the Secretary of State may order the release of a prisoner. The Minister of Home Affairs in Northern Ireland has similar powers: see Quekett, The Constitution of Northern Ireland, Part I, pp. 78-80. The prisoner's life is in danger. [Reference was also made to *Rex v. Morton Brown* (2).]

Lowry A.-G., (with him *Harrison*) for the respondent:

A Secretary of State, acting as servant of the Crown, cannot be held liable. In this case the wrong persons have moved against the wrong person. The 1913 Act provides that in Ireland the Lord Lieutenant shall have the powers of the Secretary of State; the Government of Ireland Act, 1920, by section 8, preserved his powers as regards Northern Ireland; and the Irish Free State (Consequential Provisions) Act, 1922, First Schedule, has transferred the powers of the Lord Lieutenant to the Governor of Northern Ireland.

The prisoner has not applied for a solicitor. Mr.

(1) (1909) 26 T.L.R. 139. (2) (1909) 74 J.P. 53.

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Diamond and Miss Fleming have not an interest in the case. As Wright J. said in *The Queen v. Lewisham Union* (1): "Certainly, so long as I have had anything "to do with applications for a mandamus I have "always understood that the applicant, in order to "entitle himself to a mandamus, must first of all show "that he has a specific right to ask for the interfer- "ence of the Court."

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ANDREWS L.C.J.: We thank Mr. Lynn for the assistance which he has given us, and for the moderation and legal propriety with which he has conducted this case.

The application involves issues of importance. The applicants are Mr. Henry Diamond, M.P. for the Falls Division of Belfast, and Miss Nellie Fleming, of Killarney, Eire. The writ of mandamus applied for should, it is submitted, be directed to Mr. Edmond Warnock, Minister of Home Affairs for Northern Ireland, directing him to release forthwith David Fleming, a prisoner in Crumlin Road Gaol. Nellie Fleming is a sister of the prisoner.

David Fleming is and has been on voluntary hunger strike since the 21st March, 1946, a period of fifty-eight days. It is alleged that the state of health of David Fleming is now such as to render him in danger of death. On the 13th May, 1946, the Sacrament of Extreme Unction was administered to him.

Now what is sought from this Court is the high prerogative writ of mandamus to compel the Minister to perform his alleged duty of releasing the prisoner. By a high prerogative writ is meant not a writ issued as of right, but a writ issued at the discretion of the Sovereign himself acting through the Court in which he is supposed to be personally present. (See the speech of Lord Hatherley in *R. v. All Saints, Wigan (Churchwardens of)* (2), and the judgment of Lord Mansfield in *R. v. Barker* (3).)

The first question to be determined is: have the applicants, or has either of them, a *locus standi*. i.e., a

(1) [1897] 1 Q.B. 498, 500.
(2) (1876) L.R. 1 App. Cas. 611, 622.
(3) (1762) 3 Burr. 1265, 1267.

legal right to make this application? The writ of mandamus can only issue where the party seeking it has a right to have something done, and has no other specific means of compelling its performance (Blackstone, 3 Com. 110). There must be a legal right on the part of the applicant to the performance by the person or body against whom he applies of some duty of a public and not merely private character. Lord Ellenborough summed up the legal position in *R. v. Archbishop of Canterbury* (1) in these words: "There ought in all cases to be a specific legal right "as well as the want of a specific legal remedy, in "order to found an application for a mandamus."

In this application neither applicant has shown any legal right to maintain the proceedings. The fact that one of the applicants is a Member of Parliament who is interested in his welfare, or that the other applicant, who resides outside the jurisdiction, is the prisoner's sister, confers no right upon either to the writ of mandamus sought.

Secondly, the writ will not lie against the respondent as a Minister of the Crown. The writ is never granted against the Crown or the officers or servants of the Crown as such. (Shortt on Mandamus, p. 225). In *R. v. Powell* (2), Lord Denman C.J. expressed the matter thus: "That there can be no mandamus to "the Sovereign there can be no doubt, both because "there would be an incongruity in the Queen com- "manding herself to do an act, and also because the "disobedience to a writ of mandamus is to be enforced "by attachment." Again, in *R. v. The Lords Commissioners of the Treasury*, (3) Cockburn C.J. said: "Over the Sovereign we can have no power. In like "manner where the parties are acting as servants of "the Crown, and are amenable to the Crown, whose "servants they are, they are not amenable to us in "the exercise of our prerogative jurisdiction." Accordingly, on this ground also the application is unsustainable.

Thirdly, the duty which is enforceable by mandamus

(1) (1807) 8 East. 213, 219.
(2) (1841) 1 Q.B. 352, 361.
(3) (1872) L.R. 7 Q.B. 387, 391.

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must not only be a public duty; it must be what Abbot C.J. called in *R. v. Fowey Borough* (1), an "imperious duty," that is one as to which no liberty of choice as to the performance or non-performance of it is left with the officer or tribunal that has to discharge it. (Shortt on Mandamus, p. 252).

In my opinion, the alleged duty under the Prisoners (Temporary Discharge for Ill-health) Act, 1913, is not imperious; it is, indeed, merely a power which may be exercised at discretion. It is left to the mere will and pleasure of the person who possesses it. Section 1 (1) reads as follows: "If the Secretary of State is satisfied "that by reason of the condition of a prisoner's health "it is undesirable to detain him in prison . . . the "Secretary of State may, if he thinks fit, having "regard to all the circumstances of the case, by order "authorise the temporary discharge of the prisoner "for such period and subject to such conditions as "may be stated in the order." The next sub-section is again discretionary: ". . . such extended period "as may be fixed by any subsequent order of the "Secretary of State . . ." This is not a mandatory section. Indeed, no words could confer a wider discretion; and the Court in exercising its jurisdiction in regard to the issuing of a writ of mandamus will not inquire into the grounds and reasons that have influenced the decision in reference to the exercise of a discretionary power. (See the judgment of Lord Tenterden C.J. in *R. v. Mayor etc. of London* (2)).

Fourthly, the writ is wrongly sought under the Act of 1913 against the Minister of Home Affairs, Northern Ireland. The power to release conferred by the Act of 1913 is not vested in that Minister. By section 3 it is provided that in the application of the Act to Ireland references to the Secretary of State shall be construed as references to the Lord Lieutenant. The Government of Ireland Act, 1920, by section 8 made the powers of the Lord Lieutenant applicable in Northern Ireland, and by the Irish Free State (Consequential Provisions) Act, 1922, second session, First Schedule, 1 (1), it is provided: "There shall be

(1) (1824) 2 B. & C. 584, 591. (2) (1832) 3 B. & Ad. 255, 271.

"a Governor of Northern Ireland, and the Provisions "of the Government of Ireland Act, 1920, with "respect to the Lord Lieutenant shall apply to the "Governor of Northern Ireland, and in the Govern- "ment of Ireland Act, 1920 (hereinafter referred to "as the principal Act) *and in any other enactment* "references to the Lord Lieutenant shall, in their "application to Northern Ireland, be construed as "references to the Governor of Northern Ireland." The learned Attorney-General, though called upon by the Court, has not brought to our notice any statutory or other provision affecting the legal position as so stated. His Excellency the Governor may seek advice from the Minister of the Crown but this does not transfer the power to such Minister. This, therefore, is a further ground for refusing the present application.

For all these reasons, therefore, namely : (1) that the applicants have no legal right to maintain the proceedings ; (2) that there is no right to direct the writ to a Minister of the Crown ; (3) that the power to release conferred by the Prisoners (Temporary Discharge for Ill-health) Act, 1913, is not imperious, but purely discretionary ; and (4) that the power is one which is vested not in the Minister but in the Governor this application is in my opinion misconceived and must be dismissed ; but in all the circumstances we shall make no order as to costs.

BLACK J. : I concur and have nothing useful to add. BLACK J.

Application dismissed.

Solicitor for the Applicants : *D. P. Marrinan.*
Solicitor for the Defendant : *Chief Crown Solicitor.*

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Feb. 18, 19, 20; Mar. 4, 5; June 7.

THE TRUSTEES OF THE LONDONDERRY PRESBYTERIAN CHURCH HOUSE v. THE COMMISSIONERS OF INLAND REVENUE (1).

Revenue—Income Tax—Charity—Premises held on trust for assisting and helping in religious, moral, social and recreative life of members of church in a particular locality—Whether trust for charitable purposes only—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *section* 37 (1) (*a*)—*Finance Act*, 1921 (11 & 12 *Geo.* 5, *c.* 32), *section* 30 (1) (*a*).

By a trust deed certain premises were vested in trustees "upon "trust to permit the same or any part thereof to be used as a Hall "for meetings or for Social or Recreational purposes in connection "with the various Presbyterian Churches in the City of L. and the "surrounding district or as a Hostel or Boarding House or as a Library "or for such other purpose or purposes as the Board of Governors ". . . shall from time to time think fit." The trust deed further declared its true intention and meaning to be that the premises should be used "for the purposes of assisting and helping in the "religious, moral, social and recreative life of those connected with "the Presbyterian Church in the City of L. and surrounding district "in such manner as the Board of Governors . . . shall from time to "think right." The trustees claimed exemption from Income Tax on the ground that the trust under which the premises were held was a trust for charitable purposes only within section 37 (1) (*a*) of the Income Tax Act, 1918, and section 30 (1) (*a*) of the Finance Act, 1921, but this claim was rejected by the Special Commissioners who stated a case for the opinion of the High Court. MacDermott J. held that the trust was not one solely for the advancement of religion but that it was a trust for purposes beneficial to a section of the community within the fourth category of charitable trusts enumerated by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891], A.C. 531, 583, and that accordingly the trust was one for charitable purposes only.

Held, by the Court of Appeal (Andrews L.C.J., Babington L.J. and Black J.):—

(1) that the trust was not one solely for the advancement of religion because on the true construction of the trust deed the premises could be used for purposes which were merely social or recreative and which were not purposes "assisting and helping" in the religious life of those intended to be benefited by the trust,

(1) In the Court of Appeal before Andrews L.C.J., Babington L.J. and Black J.

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and further because purposes " assisting and helping " in the religious life of those intended to be benefited by the trust included activities which whilst indirectly furthering a religious purpose were not directly religious ; and

(2) that the trust did not fall within the fourth category in *Pemsel's case* (supra) because its purposes even if beneficial to a section of the community were not within the spirit and intention of the Statutes of Charitable Uses (43 Eliz., c. 4 and 10 Car. 1, sess. 3, c. 1 (Ir.)).

Quaere whether a class of persons ascertained by reference to their connection with a particular religious denomination can be regarded as a section of the community within the fourth category of *Pemsel's case* (supra).

Decision of MacDermott J. reversed.

APPEAL from decision of MacDermott J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The facts and arguments of counsel sufficiently appear from the judgments.

Curran K.C. and *Topping* for the appellants, the Commissioners of Inland Revenue.

McCoy K.C. and *McVeigh* for the respondents, the Trustees of the Londonderry Presbyterian Church House.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J.: This matter came before the Court on appeal by the Commissioners of Inland Revenue (hereinafter called " the Commissioners ") from an order made by MacDermott J. on 21st December, 1945. The notice of appeal seeks an order that the said order of 21st December, 1945, may be set aside, and that in lieu thereof it may be adjudged that the Trustees of the Londonderry Presbyterian Church House (hereinafter called " the " trustees ") were and are assessable to Income Tax under Schedule A of the Income Tax Act, 1918, for the ten years 1934/1935 to 1943/1944 in respect of certain properties owned and occupied by the trustees. The ground relied upon in support of the appeal was the learned Judge's alleged misdirection in law in

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holding that the purposes of the trust declared by a certain trust deed, dated 21st November, 1922, under which the trustees held the said properties, are charitable only.

The facts are set out in a case stated under the Finance Act, 1925, section 19 (3), and the Income Tax Act, 1918, section 149, by the Commissioners for the Special Purposes of the Income Tax Acts who, on 22nd March, 1945, heard claims by the trustees (*a*) for exemption under section 37 (1) (*a*) of the Income Tax Act, 1918, from Income Tax under Schedule A in respect of the rents and profits of certain of the said properties, and (*b*) for exemption under section 30 (1)(a) of the Finance Act, 1921, from Income Tax under Schedule A in respect of certain other of the said properties owned and occupied by the trustees.

The claims, which covered the said period of ten years, had previously been made to the Commissioners of Inland Revenue, who had dismissed the same ; and such dismissal was confirmed by the Special Commissioners, who thereupon, at the request of the trustees, stated the Case for the opinion of the High Court.

The several properties referred to comprised the following :—

(*a*) a building known as "The Church House," situate in Great James's Street, Londonderry,
(*b*) a caretaker's house adjoining the Church House,
(*c*) a dwelling house known as "The Manse," and
(*d*) another dwelling house,

such two dwelling houses being situate in two other streets in the said City.

Up to 1st April, 1943, the Church House and the caretaker's house were occupied by the trustees ; and, accordingly, the claims for the years 1934/35 to 1942/43 in respect of these two houses were for exemption under section 30 (1) (*a*) of the Finance Act, 1921. On 1st April, 1943, the Church House was requisitioned by the Admiralty, who paid the trustees compensation rent for the same. Accordingly, the claim for the year 1943/44 in regard to Church House was for exemption under section 37 of the Income Tax Act, 1918. As the caretaker's house was not requisitioned

the claim in respect thereof for 1943/44 was, as before, under section 30 (1) (*a*) of the Finance Act, 1921. The two dwelling houses were let by the trustees to tenants who occupied them as private residences throughout the whole of the said ten-year period; and the claims in respect of them were, accordingly, for exemption under said section 37 of the Income Tax Act, 1918. It is unnecessary to consider separately the precise terms of the two sections, as it was agreed that the sole point which we were called upon to determine in connection with the said claims was whether the said properties were held by the trustees upon trust for charitable purposes only; and the entire case was argued upon both sides upon this sole issue.

All the four properties aforementioned were on 21st November, 1922, conveyed to fourteen persons, who by deed poll of the same date declared the trusts upon which they were to hold the same. The respondents are the present trustees; and the trusts upon which they hold the said properties, so far as is material for our present purposes, are as follows :—

"Upon trust to permit the same or any part thereof "to be used as a Hall for meetings or for social or "recreational purposes in connection with the "various Presbyterian Churches in the City of "Londonderry and the surrounding district or as a "Hostel or Boarding House or as a Library or for "such other purpose or purposes as the Board of "Governors hereinafter defined or any Board "of Governors or Committee to be substituted "therefor in manner hereinafter appearing shall "from time to time think fit it being the true "intention and meaning of these presents that said "premises shall be used for the purposes of assisting "and helping in the religious moral social and "recreative life of those connected with the Pres-"byterian Church in the City of Londonderry and "surrounding district in such manner as the said "Board of Governors or substituted Board of "Governors or Committee shall from time to time "think right."

The said deed contained provisions in regard to the

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appointment of new trustees, the power of electing such new trustees in the event of the death of all the trustees being vested in the Committees of the various Presbyterian Churches in the City of Londonderry. Any person appointed as a new trustee must be an active and subscribing member of one of the various Presbyterian Churches in the City of Londonderry. The control of the buildings was vested in the Board of Governors who consisted of the trustees and an equal number of members to be selected by the Committees of the various Presbyterian Churches in the City of Londonderry in the proportions therein specified. All persons so nominated must be active and subscribing members of the various Churches for which they are nominated. The deed concludes with a provision enabling the trustees to revoke the deed in so far as it relates to the control and management of the premises by the Board of Governors ; but the trustees shall continue to hold the said premises upon the trusts therein firstly declared and hereinbefore mentioned.

The user of the premises during the relevant period has been briefly as follows :—The Church House, whilst in the occupation of the trustees, was used for Presbytery, Synod and other Londonderry Church meetings ; for teas, plays and concerts connected with church organisations, and for the playing of table tennis ; for the playing of badminton by clubs connected with the Presbyterian Churches in Londonderry; and, finally, it was used by outside clubs, payments made by clubs in all cases covering only the cost of heating and lighting, so that no profit was made from such lettings. The caretaker's house was used throughout the whole period as the residence of the caretaker of the Church House ; and the rents received from the tenants of the two houses which were let, and the compensation rent received in respect of the requisitioning of the Church House, were accumulated by the trustees, and were held by them upon the trusts declared by the deed.

The case of exemption from income tax was presented on behalf of the trustees on the twofold

grounds :—(1) that the several properties were held by them upon trusts for the advancement of religion ; and, alternatively, (2) that the trusts were for other purposes beneficial to the community falling within the fourth class of legal charity as defined, or rather grouped, by Lord Macnaghten in his authoritative speech in *Commissioners for Special Purposes of Income Tax v. Pemsel* (1). These submissions must be considered separately.

Upon the first submission I find myself for the most part in agreement with the opinion expressed by MacDermott J. in his closely reasoned judgment. On the question of construction, however, which is involved in the use of the words " religious moral social " *and* recreative life " of the beneficiaries, I would have considerable difficulty in holding, as I understand him to do, that *every* use to which the premises can legitimately be put must assist and help *all* the four purposes specified. So to hold would, in my opinion, limit the user to such an extent as to make it virtually impracticable. Moreover, such construction would ignore the disjunctive character of the purposes for which the Hall can be used as set out in the primary words of the trust, in which it is declared that the Hall should be used for meetings, *or* for social *or* recreative purposes. I have little doubt that the proper construction to place upon the terms of the trust taken as a whole is that the use of the Hall for meetings might assist and help the religious and moral life of those intended to benefit, whilst its use for social and recreative purposes should satisfy their requirements in regard to social and recreative life. Both would be within the terms of the trust. Presbytery or Synod meetings would properly be classified as religious, but not as recreative in character ; whilst badminton, though both social and recreative, could not by any stretch of the term be properly designated religious. I do not, however, regard this matter of construction as vital ; for, quite apart from the fact that certain authorised uses of the Hall are not religious in character, I am clearly of opinion that the trusts

(1) [1891] A.C. 531, 583.

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of this deed are not trusts for the "advancement of "religion" as this term has been interpreted in hitherto accepted authority. To use premises for the purposes of "assisting and helping" in a religious life is by no means the same thing as to use them for the advancement of religion. Greater still is the difference if we are dealing with a social and recreative life. It is the character of the uses themselves to which we must look, not the ultimate object or goal to which they may be conducive. The true meaning and significance of such words "assisting and helping" in the religious life of those intended to benefit by the gift is illustrated by the opinion of the Privy Council in *Dunne v. Byrne* (1). The words of the bequest in that case were "to the Roman Catholic Archbishop "of Brisbane and his successors to be used and ex-"pended wholly or in part as such Archbishop may "judge most conducive to the good of religion in this "diocese." This was held not to be a good charitable bequest, and was accordingly void, the expression used by the testator not being identical with the expression "for religious purposes." At page 410 of the judgment, which was delivered by Lord Macnaghten, it is stated: "It can hardly be disputed "that a thing may be 'conducive,' and, in particular "circumstances 'most conducive,' to the good of "religion in a particular diocese or in a particular "district without being charitable in the sense which "the Court attaches to the word, and indeed without "being in itself in any sense religious." The learned Lord comes back to the same thought at p. 411, where he says: "It was said: This is a gift for religious "purposes, and the Court has held over and over again "that a gift for religious purposes is a good charitable "gift. That is true. But the answer is: This is not "in terms a gift for religious purposes, nor are the "words synonymous with that expression." The judgment follows the principle underlying the decision of Sir John Wickens V.C. in *Cocks v. Manners* (2), in which a fund was dedicated to a purpose which, though not so expressed, might, as Lord Macnaghten

(1) [1912] A.C. 407. (2) [1871] L.R. 12 Eq. 574.

said, be considered " conducive to the good of religion," yet it certainly was not charitable.

Dunne v. Byrne (1) was fully recognised and applied by the House of Lords in *Farley v. Westminster Bank* (2), where a testatrix bequeathed the residue of her estate in equal shares to two charities and to the respective vicars and churchwardens of two named churches " for parish work." It was held that, as the words " for parish work " would in their ordinary meaning include objects which were not charitable in the legal sense, those gifts were not charitable and consequently failed. The words were, according to Lord Atkin, so wide that " on no construction could they be brought " within the limited meaning of ' charitable ' as used " in the law." It was not enough that some of the activities of the parish covered by the words fell within the definition of religious purposes, or that they were " conducive to " the moral and spiritual good of the congregation.

Yet another illustration is provided by the case of *In re Jackson* (3), in which a bequest to the Archbishop of Wales to be paid and applied by him for a certain specified purpose or in his discretion in any manner he might think best for *helping* to carry on the work of the Church in Wales was held by Eve J. as regards the alternative gift to be too wide and indefinite to be necessarily for a charitable purpose, and the whole gift was, accordingly, declared void.

I shall not further examine the cases, some of which it must be admitted are difficult to explain and to reconcile. Suffice it for me to say that there may be, as in my opinion there are in the present case, certain authorised activities or duties, as, for example, of a social character which, whilst indirectly furthering a religious purpose, are not directly religious. Such purposes are not in my judgment charitable. A trust which only indirectly benefits a charity does not constitute a valid charitable trust. For these reasons the exemption from taxation claimed on the ground that the trusts are for the advancement of religion must fail.

(1) [1912] A.C. 407.
(2) [1939] A.C. 430.
(3) [1930] 2 Ch. 389.

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I should perhaps add that the conclusion at which I have arrived is not affected by the decision of the King's Bench Division in *Commissioner of Valuation v. Fisherwick Church Trustees* (1), which may be justified on the principle of *de minimis non curat lex.* I am quite unable to apply this principle to the present case in the absence of necessary findings of fact upon the point by the Special Commissioners who stated the case.

The main argument relied upon by Mr. McCoy in support of the trustees' claim for exemption was, however, that which was alternatively advanced, namely, that the case fell within Lord Macnaghten's fourth class of legal charity—"trusts for other pur- "poses beneficial to the community, not falling under "any of the preceding heads." This argument was accepted by MacDermott J. I agree with him that we must come back to the true intention and expressed purpose of the trust, namely, that "of "assisting and helping in the religious moral social "and recreative life" of those whom the trust was intended to benefit. So viewing it the learned Judge held that what the trust aimed at doing was to provide, what he called, a "community centre for the Pres- "byterians of Londonderry and its environs."

It was particularly to be observed that counsel for the trustees did not, as I understood him, present his argument in support of this fourth class of legal charity independently of or divorced from his earlier submission that the trusts were for the advancement of religion. It was a somewhat natural course for him to follow having regard to the words of the trust. But the issue thus presented appears to me to be this : Can words which are too wide to fall within Lord Macnaghten's third class, as including purely secular purposes, be held to constitute a valid legal charity within the fourth class, especially when, as in the present case, they admittedly are intended not to confer benefits upon the community as a whole, but only upon the particular objects already referred to and specified in the trust deed ?

(1) [1927] N.I. 76.

In my opinion the first and most important consideration in connection with Lord Macnaghten's fourth class is that which was expressed by Viscount Cave L.C. in *Attorney General v. National Provincial Bank* (1), that " Lord Macnaghten did not mean that " all trusts for purposes beneficial to the community " are charitable, but that there were certain charitable " trusts which fell within that category; and accord- " ingly to argue that because a trust is for a purpose " beneficial to the community it is therefore a charit- " able trust is to turn round his sentence and to give " it a different meaning. So here it is not enough to " say that the trust in question is for public purposes " beneficial to the community or for the public welfare; " you must also show it to be a charitable trust."

Lord Hanworth M.R. reaffirms this law in the subsequent anti-vivisectionist case of *In re Grove-Grady* (2), in which at pp. 571-2 he says :—" Turning " then again to the fourth category in *Pemsel's case* (3) " there are two questions that must be asked and " answered : (1) Is the trust for a purpose beneficial " to the community ? (2) If it satisfies that first test, " is it charitable ? A trust for a philanthropic purpose " would satisfy the first question but not the second : " see *In re Macduff* (4), for there may be philanthropic " purposes which are not charitable."

This, as I understand it, simply means that whilst benefit to the community must be established to bring a trust within this fourth class, this in itself is not sufficient—the trust must also be shown to be charitable, which involves that the object must be within the spirit and intendment of the Statute of Elizabeth (5), or, in Ireland, of the corresponding statute of 10 Charles I (6) which Lord Macnaghten has told us gives in Ireland the same legal and technical meaning to the term " charity " as it has received in England.

The authorities, whose number is legion, upon whether particular trusts fall within or without Lord Macnaghten's fourth category baffle all efforts on my

(1) [1924] A.C. 262, 265.
(2) [1929] 1 Ch. 557.
(3) [1891] A.C. 531, 583.
(4) [1896] 2 Ch. 451.
(5) 43 Eliz., c. 4.
(6) 10 Car. I, sess. 3, c. 1.

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part to reconcile with one another, and no useful purpose would be served in the circumstances by reviewing them. Judicial minds have operated not always consistently on facts admittedly different; and the result can only be described as in a measure chaotic. I shall simply content myself with saying that I find nothing in the statutes referred to which would assist me in holding that the trusts in the present case for religious, moral, social and recreative purposes, excluded as I have held them to be from Lord Macnaghten's third class, fall within the fourth class as a valid charitable trust. The test is not whether the objects or purposes aimed at are beneficial to or receive the general acceptance of the community. It is simply whether they conform or not to the requirements and essentials of a legal charity.

The last question argued before us was whether the trusts of this deed are beneficial "to the com- "munity." This phrase has been interpreted as meaning not only the whole community in either a large or smaller defined area, but as also including a recognised and defined section of the community. MacDermott J. has held that this condition is satisfied in the present case, and he has, indeed, as I have already stated, referred to the Hall as a "community "centre." Members of the Presbyterian Church in Londonderry are of course members of the community of people residing in that area; but are they a "section "of the community" within the meaning of that phrase as interpreted in the decided cases? It is argued for the Commissioners that they are not—that they are in fact a mere association of private individuals who are voluntarily united for a single religious purpose —a body who, to borrow Earl Cairns's phrase in *Goodman v. Mayor of Saltash* (1), are a mere "fluctu- "ating body of private individuals." My clear opinion is that the present case is essentially different from the case of a club membership, or an employees' voluntary association, no matter how benevolent or charitable their objects or purposes may be. Likewise, it differs from such cases as the *General Medical Council*

(1) (1882) 7 A.C. 633, 650.

v. Commissioners of Inland Revenue (1), in which it was held that gifts for the benefit of a particular profession or other special group of people are not charitable, even though the activity of the profession benefits the public. Such trusts do not in the true sense constitute public charities, nor do they directly benefit the community or a recognised " section of the " community." An institution formed for the benefit of its members is not an institution for the benefit of the public or of a section of the public.

Reliance was, however, strongly placed before us by counsel for the Commissioners upon the judgment of Lord Greene M.R. in the recent case of *In re Compton* (2), but neither the judgment nor the actual decision appears to me to be in any way helpful to the Commissioners. The testatrix there created a trust for the education of the lawful descendants of three named persons to fit such descendants to be servants of God serving the nation, not as students for research of any kind. The descendants of two of such persons were to have the preference as scholarships for the time thought best by the trustees not over the age of twenty-six years. There were twenty-eight descendants living at the time of the proceedings. The trust was held, and, if I may say so, obviously rightly held, to be a " family trust " and not one for the benefit of a section of the community. It was not a valid charitable trust, for the beneficiaries were defined by reference to a personal relationship, and so it lacked the quality of being a public trust. It was a mere private or family benefaction ; and no gift can be charitable in the legal sense unless it is of the necessary public character. Lord Greene declared that no definition of what is meant by a " section of the " public " had, so far as he was aware, been laid down, and he disclaimed any intention on his part to be the first to make the attempt to define it ; but he indicated very clearly that a trust of a public character is one in which the beneficiaries do not enjoy the benefit when they receive it by virtue of their character as individuals, but by virtue of their membership of a

(1) (1928) 13 T.C. 819. (2) [1945] Ch. 123.

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specified class, the common quality uniting potential beneficiaries into the class being essentially an impersonal one. This common quality is, he says, "definable by reference to what each has in common with the other, and that is something into which their status as individuals does not enter." The introduction into the qualification of persons claiming to belong to the class of a purely personal element would in his opinion deprive the gift of its necessary public character. The same principle, he adds, ought to apply when the claimants, in order to establish their status, have to assert and prove that they stand in some specified relationship to individuals such as employees, for a purely personal element enters into and is an essential part of the qualification. Such was the case of *In re Drummond* (1).

I accept this statement of the law without hesitation, but I fail to find any analogy or similarity between *In re Compton* (2) and the present case, in which there appears to me to be neither a family nor a personal test to qualify for membership of the class. A "section" is nothing but a portion or a division; and when that portion is ascertained or that division of the public is affected by reference to something such as religious belief, which is not personal in the sense in which that term is used in this connection, I think it may properly be described as a "section of the public." Indeed, are we not all very familiar with the use of the term "sect" as referring to a body of men and women who are united in holding some particular religious belief? If the Presbyterians in Londonderry are not a "section of the community" there, neither then, logically, can the whole Presbyterian body be such a "section," though it constitutes the largest religious denomination in our Province. So to hold would in my opinion be an abuse of language, and accordingly unjustifiable. In truth, these Presbyterians in Londonderry constitute in my opinion a particular section of the public at large which is essentially different in character from a particular section of private individuals (see the judgment of Lawrence J. in *Trustees of Wernher's*

(1) [1914] 2 Ch. 90. (2) [1945] Ch. 123.

Charitable Trust v. Commissioner of Inland Revenue (1)). They are in my opinion sufficiently defined and identifiable by a common quality of a public nature (see the judgment of Scott and Lawrence L.JJ. in *Williams (H. J.) Trustees v. Inland Revenue Commissioners* (2), a case in which the distinction was again made clear, but in which the Commissioners were successful on the ground that the purposes of the trust included many which were not charitable, and that the dominant purpose was that the institute which the trust was founded to create should be maintained and used as an ordinary social club).

The opinion which I have expressed upon this last issue does not, of course, affect my decision ; but, as the point was very fully argued, I have felt it my duty to make my views clear so that there may be no room for misunderstanding in the future such as might arise were I to remain silent in regard to it.

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The decision of MacDermott J. must be set aside, and the Commissioners must have their costs of the proceedings including the costs of this appeal.

BABINGTON L.J. : The respondents claim exemption from Income Tax in respect of the rents profits and occupation of certain properties in the City of Londonderry vested in them as trustees on the ground that the trusts declared by the deed under which they hold are charitable trusts. Having been assessed to tax, the respondents appealed to the Special Commissioners, who held that these trusts are not charitable trusts but stated a case for the opinion of the High Court.

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This case came before MacDermott J. who allowed the appeal, holding that the trusts are charitable only, and from this decision the Commissioners of Inland Revenue have appealed to this Court.

The trusts, which are set out in paragraph three of the Case Stated, are as follows :—

" Upon trust to permit the same or any part thereof
" to be used as a Hall for meetings or for Social or
" Recreational purposes in connection with the

(1) (1937) 21 T.C. 137, 142. (2) (1945) 173 L.T. 221, 222, 223.

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"various Presbyterian Churches in the City of "Londonderry and the surrounding district or as a "Hostel or Boarding House or as a Library or for "such other purpose or purposes as the Board of "Governors hereinafter defined or any Board of "Governors or Committee to be substituted therefor "in manner hereinafter appearing shall from time "to time think fit, it being the true intention and "meaning of these presents that the said premises "shall be used for the purposes of assisting and "helping in the religious, moral, social and recreative "life of those connected with the Presbyterian "Church in the City of Londonderry and surrounding "district in such manner as the said Board of "Governors or substituted Board of Governors or "Committee shall from time to time think right."

On the face of this document it is plain that the property can be applied for purposes which are not necessarily religious and the onus of establishing that the trusts are charitable is therefore on the respondents.

They have attempted to discharge this burden by arguing that the trusts are (*a*) for the advancement of religion only, and (*b*) that, alternatively, they are trusts for purposes beneficial to the community and therefore constitute a good public charity.

MacDermott J. has held that this is not a trust for the advancement of religion and I agree with his judgment on this branch of the case.

The terms of the trust contain no limitation of the purposes for which the premises may be used or of the way in which the religious, moral, social and recreative life of those connected with the Presbyterian Church in the City of Londonderry and surrounding district may be assisted and helped. These are matters within the discretion of the Managing Body and the trusts can therefore only be regarded as being for the advancement of religion in the sense that they must incidentally benefit the Presbyterian Church in the City of Londonderry and the surrounding district, and this is not sufficient to constitute a good charitable trust. (*Dunne v. Byrne* (1), cited by MacDermott J.; *Farley v.*

(1) [1912] A.C. 407.

Westminster Bank (1)). A great number of authorities were cited on this branch of the argument but when examined they all appear to have been decided on their facts and they throw no doubt on the application of the principle settled in *Dunne v. Byrne* (2), namely, that "If the property, as Sir William Grant said in "*James v. Allen* (3), might consistently with the will "be applied to other than strictly charitable "purposes the trust is too indefinite for the Court to "execute."

This first proposition is, in my opinion, barely arguable having regard to the terms of the trusts, and I do not think it necessary to deal in detail with all the authorities cited.

But it was further contended that, whether there be a good trust for the advancement of religion or not, it is a trust for purposes beneficial to the community within the fourth category enumerated by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel* (4). Counsel for the trustees did not face this issue independently of their argument on the first branch of the case but tried to carry over the religious nature of the trust to reinforce the argument that the trusts are for purposes beneficial to the community. This trust was presented to us as a good charitable trust being for religious purposes with certain objects added of a secular nature which are also directed towards the advancement of religion, and that they are for purposes beneficial to an important section of the community, i.e., persons in connection with the various Presbyterian Churches in the City of Londonderry and the surrounding district.

The first part of this argument is a repetition of that advanced in support of the claim that this is a trust for the advancement of religion, and what may be called the composite argument is an attempt to introduce a new principle into the law of charities which, in my opinion, cannot be supported by authority and which, if established, would bring within the fold of

(1) [1939] A.C. 430.
(2) [1912] A.C. 407.
(3) (1817) 3 Mer. 17.
(4) [1891] A.C. 531, 583.

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charity all activities or money-making ventures carried on for the benefit of an acknowledged charity. The burden of establishing this proposition was a formidable one, and the counsel for the trustees did not attempt to do so directly but entangled the thread of their argument with the further contention that this is a good public charity. The furthest the authorities go appears to me to be that if the additional secular or non-charitable objects are of such a nature or so unimportant that the trusts may in the circumstances be regarded as being for religious or other charitable purposes, they may be held to constitute a good charitable trust.

This is a matter of construction and not of principle and can have no bearing on the present case having regard to the discretion given to the trustees.

In re Scowcroft (1), and *Shillington v. Portadown Urban District Council* (2), are cases in which such gifts were held to be charitable on the construction of their peculiar facts.

It is unnecessary to pursue this line of authorities as the objects for which the trust property in this case may be used cannot be said to be of such a nature or so unimportant that the general charitable intention must prevail.

The case of the *Commissioners of Valuation v. Fisherwick Church Trustees* (3) was cited in this connection for the proposition that if the trust is one for religious purposes, any secular use of the funds or property of the trust that may be permitted does not destroy the religious nature of the trust if it indirectly advances the cause of religion. In that case it was held that the premises were used exclusively for charitable purposes though the game of Badminton was played in the Church Hall and a subscription charged to members who played. Moore L.C.J. says at p. 81 : " The playing of badminton in this hall " forms a minor incident intended to assist the work " of this church, and the provision of facilities for " this form of recreation, forming as it does part of

(1) [1898] 2 Ch. 638.
(2) [1911] 1 I.R. 247.
(3) [1927] N.I. 76.

"the charitable scheme of the church, should be "treated as though it were a charitable purpose, and "the building is therefore exempt from assessment." Brown J. concurred and says at p. 82: "If this is not "regarded as a case in which the maxim 'de minimis "non curat lex' applies, it is certainly one in which "the user of the church hall for recreation and games "must be regarded . . . as part of the religious work "of the church. Such a user is in the true sense "charitable, and for the advancement of religion."

The decision in this case turned on its facts, to which the "*de minimis*" rule was applied. It was pressed on us as establishing a trust under which any secular activity which can be said to further the interests of religion or of a religious denomination may be carried on does not thereby cease to be charitable. This is an attempt to introduce the rule that gifts indirectly benefiting charity are themselves charitable, and if this case has the effect claimed for it, it cannot, in my opinion, be supported. I treat it as an application of the "*de minimis*" rule and express no opinion as to its validity on that ground as it does not arise in the present case.

It was argued that such bequests should receive a liberal or benevolent construction, but a gift which can be used for non-charitable purposes at the discretion of the trustee cannot be validated under this rule. (*In re Davies* (1).) The rule, if it can be so described, is stated by Lord Loreburn L.C. in *Weir v. Crum-Brown* (2), and appears to be that if a general charitable intention can be found in the bequest the Court will not construe it as being void for uncertainty if it is possible to carry it into operation. This is not so in the present case in which, as in *In re Davies* (1), the discretion vested in the trustees negatives a general charitable intention.

Having so far as possible disentangled the first branch of the argument from the second, I now come to the consideration of the latter. Is this a good public charity within the fourth category in *Pemsel's case* (3)?

(1) (1932) 48 T.L.R. 539.
(2) [1908] A.C. 162, 167.
(3) [1891] A.C. 531, 583.

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Once it is realized that this is not a trust for the advancement of religion there can only be one answer to this question, namely, that this is not a charity in any legal sense. To make it so it would have to come within some of the heads in the preamble to the Statute of Elizabeth or be for some purpose beneficial to the community—and it cannot be brought under either. The Presbyterian Church is not a section of the public. Its members, or those of its members to be benefited under this trust, are no doubt members of the public but they are not a section of it any more than were the workpeople in *In re Drummond* (1), and the trust is therefore not a trust for general public purposes but for a fluctuating body of private individuals.

This trust is said to fulfil the tests applied by Fitzgibbon L.J. in *In re Cranston* (2), and Mr. McCoy maintained that members of religious bodies may constitute a section of the public, but I cannot assent to this. Fitzgibbon L.J. says that a legal charity must "be *public*, i.e., that those to be benefited shall form a "class worthy, in numbers or importance, of considera-"tion as a public object of generosity," but he was dealing with charities generally and not with the point at issue in the present case, namely, whether these trusts fall within Lord Macnaghten's fourth category.

Considerable confusion has, I think, arisen from a failure to distinguish between the public element in cases under the first three of Lord Macnaghten's categories and the fourth. Under the first three the charitable intention must be established, i.e., for the relief of poverty, the advancement of religion, or the advancement of education. The objects must be of a public nature, as Fitzgibbon L.J. says, but it is immaterial under these categories how the class is delineated provided it is adequate in numbers or importance.

In cases falling within category number four, however, there can be no charity until it is shown that the gift is to or for the benefit of the public or a section

(1) [1914] 2 Ch. 90. (2) [1898] 1 I.R. 431.

of the public and this is a primary test which must be satisfied before the gift can be held charitable.

" In Ireland, though neither the Statute of Elizabeth " nor the so-called Statute of Mortmain extended to that " country, the legal and technical meaning of the term " charity is precisely the same as it is in England " (Lord Macnaghten in *Pemsel's case* (1)), and the enumeration of charitable objects in the preamble to the Statute of Elizabeth, as subsequently extended by judicial decisions, have been followed in this country.

They are grouped under Lord Macnaghten's headings, and the decisions as to what is necessary to constitute a good public charity under category number four were cited to us at considerable length to show that a class delineated by reference to a religious denomination may be a section of the public.

The Presbyterian Church, in common with other religious denominations, is primarily a religious body, but it promotes and fosters various secular activities of which the trusts with which we are dealing afford a good example. The money or property applied to these activities or derived from them cannot be said to be impressed with a trust for religion, and the trusts in this case could only be held to be charitable by bringing the Presbyterian Church within Lord Macnaghten's fourth category as a section of the public so as to make them a public charity.

One distinction between a body such as the Presbyterian Church, or that part of it with which we are concerned, and a section of the public is taken in *In re Compton* (2) in the judgment of Lord Greene M.R., namely, that the relationship between members of the class is a personal one and in no way dependent on their status or condition as members of the community.

The trust here is not a trust for religious purposes but for a class of persons to be ascertained by reference to their connection with a named religious denomination. In determining whether or not this class is a section of the public no legal significance can be

(1) [1891] A.C. 531, 582. (2) [1945] Ch. 123.

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attached to its religious affiliations but it must be treated in the same way as any non-religious class such as the members of a club or of a trading concern.

Looked at from this point of view the members of a religious denomination cannot be said to be a section of the public. Its members are associated voluntarily and their membership has nothing to say to their status or condition as members of the public. Such associations may cease to exist at any time but their members will nevertheless continue to be members of the community, which will be neither greater nor less than before, and the fact that all the members of an association are members of the public does not make the association a section of the public.

MacDermott J. says : " I do not think the bond of a " common creed or religion has yet been held to be of " such a character as of itself to render the class it " creates non-public, and I am unable to find any " principle in the decisions relied upon by the " Respondents (and in these I include *Keren's case* (1)), " which would warrant such a conclusion.

" Further, if I am right in the view, already ex- " pressed, that the necessary public element is the " same for all classes of charitable purposes I find it " hard to see how the respondents' contention could " be accepted without destroying the basis upon " which many trusts in this country have long been " held charitable.

" It is a matter of common experience, amply " evidenced in reported decisions and the existence " of many bodies and institutions, that trusts for the " relief of poverty, the promotion of education and " the advancement of religion have been regarded as " charitable without question though benefiting only " those of a particular faith."

I think these passages from the learned Judge's judgment show that he could find no authority for the proposition he was then dealing with, but, having satisfied himself that there was no decision directly contrary, he decided it in favour of the trustees on principle.

(1) [1932] A.C. 650 ; 17 T.C. 27.

In doing so he has failed to distinguish between the primary public element which is necessary to support a public charity under Lord Macnaghten's fourth category and that necessary to support charities under the first three categories which are charitable *per se*.

If this trust had been for the advancement of religion the class would clearly be sufficient in numbers and importance to sustain it as a good charitable trust though it only benefits a particular faith, the members of which do not constitute a section of the public. But as the trust is not for the advancement of religion only, the public element which is essential to make it a good charitable trust is lacking.

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MacDermott J. says further that the substance of this trust is "to provide a community centre for the "Presbyterians of Londonderry and its environs, a "place where they can foregather in a Christian "atmosphere and pursue much that is commonly "reckoned as worth while in life. I do not see that "the conjunction of the religious and moral with the "social and recreative aspects need detract from the "virtues of this institution or reduce its value to the "community."

I agree with the view of the learned Judge as to the social value of this trust but I cannot follow him in his conclusion that it is charitable. It seems to me that he has adopted the dictum expressed by Brown J. in the *Fisherwick case* (1) to the effect that everything done by the church for the advancement of religion, whether directly or indirectly, must be charitable, a proposition which, if it were acceded to, would extend the law of charities to cover an unlimited range of social, or even trading, activities far beyond the narrow limits within which charities have until now been confined.

In my opinion the trusts in this case cannot be brought within the fourth category of Lord Macnaghten's judgment in *Pemsel's case* (2), and the findings of the Commissioners must be restored.

BLACK J. BLACK J.: The statutory provisions under which the Trustees of the Londonderry Presbyterian Church

(1) [1927] N.I. 76. (2) [1891] A.C. 531, 583.

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House claim to be entitled to exemption from Income Tax under Schedule A in respect of the properties held by them upon the trusts declared in the Deed of the 21st November, 1922, are the provisions contained in section 37 of the Income Tax Act, 1918, and section 30 of the Finance Act, 1921. The question, which arises under section 37 of the Act of 1918 is whether the rents and profits derived by the Trustees from the trust properties are applied to charitable purposes only; the question under section 30 of the Act of 1921 is whether the trust properties are owned and occupied by a charity in the sense in which that term is defined by section 30 (3), namely, a body of persons or trust established for charitable purposes only. Accordingly it is agreed that the appeal turns upon the single question, do the Trustees under the terms of their trust hold the trust properties upon trust for charitable purposes only.

The relevant clause of the Trust Deed is conveniently set out in paragraph 3 of the Case Stated. This clause provides that the Trustees are to hold the trust properties upon trust to permit the same or any part thereof to be used as—

(*a*) a hall for meetings or for social or recreational purposes in connection with the various Presbyterian Churches in the City of Londonderry and the surrounding district, or
(*b*) as a hostel or boarding house, or
(*c*) as a library, or
(*d*) for such other purpose or purposes as the Board of Governors . . . shall from time to time think fit.

Then follows a declaration or provision in these terms: "It being the true intention and meaning of these "presents that the said premises shall be used for the "purposes of assisting and helping in the religious "moral social and recreative life of those connected "with the Presbyterian Church in the City of London-"derry and surrounding district in such manner as the "said Board of Governors . . . shall from time to "time think right." This I think is an overriding and restrictive provision in regard to the user of the trust

premises, setting out the purpose or object which must be served by any user for any of the specific purposes enumerated in the list contained in the first part of the clause and meaning that the premises may be used for any of those specific purposes only in so far as such user will assist and help in the religious moral social and recreative life of those connected with the Presbyterian Church in the City of Londonderry and surrounding district. The uses in fact made by the trustees of the premises while they were not under requisition are set out in paragraph four of the Case Stated as follows :—

(*a*) for meetings of the Presbytery of Derry, the Synod of Derry and Omagh, the Londonderry Presbyterian City Mission, and Sub-Committees of Churches in the district.

(*b*) for teas, plays and concerts connected with church organizations and for the playing of table tennis,

(*c*) for the playing of badminton by clubs connected with the Presbyterian Churches in Londonderry,

(*d*) for the use of outside clubs.

During the argument considerable emphasis was laid upon the use of the word " and " in the phrase, " It being the true intention and meaning of these " presents that the said premises shall be used for the " purposes of assisting and helping in the religious " moral social *and* recreative life of those connected " with the Presbyterian Church in the City of London- " derry and surrounding district." It was said that the word " and " shows that the words religious moral social and recreative must be read conjunctively and not disjunctively, and that accordingly the premises must be used for the purposes of assisting and helping in the religious *and* moral *and* social *and* recreative life of the class mentioned in the trust. This may well be. But I do not think that this use of the word " and " can be pressed so far as to necessitate that every activity which may legitimately be carried on in the premises must be such as will assist and help in both (*a*) the religious and (*b*) the moral and (*c*) the social and (*d*) the

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recreative life of the class. The use of the premises or portions thereof from time to time for religious services or for meetings of the Presbytery or of Committees concerned with the purely religious work of the Presbyterian Church in Londonderry would not in my opinion be outside the terms of the trust simply because such services or meetings were not concerned with assisting or helping in the recreative life of Presbyterians in the district. Nor in my view would the use of the premises or portions thereof from time to time for social or recreational purposes, as for example, for teas or plays or concerts or for the playing of table tennis or badminton, necessarily be outside the terms of the trust simply because such activities could not (except by a very strained and artificial use of language) be held to be assisting and helping in the religious as well as in the social and recreative life of the participants.

The trustees base their claim to exemption on the ground that the trusts set out in the Deed of 21st November, 1922, are trusts for the advancement of religion, or alternatively, that they are trusts for other purposes beneficial to the community falling under the fourth head of Lord Macnaghten's classification in *Pemsel's case* (1), or alternatively, that they are partly trusts for the advancement of religion and partly trusts falling under this fourth head of Lord Macnaghten's classification.

In the view which I take of the activities which may legitimately be carried on in the trust premises under the trusts of the Deed, I think it is quite impossible to hold that those trusts fall within the category of trusts for the advancement of religion in the sense in which that phrase is used in the law of charitable trusts. It is not sufficient that the activities may be conducive to the good of religion. One has to look at the character of the activities themselves. As Lord Macnaghten said in *Dunne v. Byrne* (2) : " It can hardly " be disputed that a thing may be ' conducive,' and in " particular circumstances ' most conducive ', to the " good of religion in a particular diocese or in a par-

(1) [1891] A.C. 531, 583. (2) [1912] A.C. 407, 410.

" ticular district without being charitable in the sense " which the Court attaches to the word, and indeed " without being in itself in any sense religious." The same idea is expressed by Lord Atkin in *Farley v. Westminster Bank* (1). Discussing legacies to the vicars and churchwardens of two parishes " for parish work " Lord Atkin says : " The expression covers the whole " of the ordinary activities of the parish, some of " which no doubt fall within the definition of religious " purposes, and all of which no doubt are religious " from the point of view of the person who is responsible " for the spiritual care of the parish in the sense that " they are conducive, perhaps, to the moral and " spiritual good of his congregation. But that, I " think, quite plainly is not enough ; and the words " are so wide that I am afraid that on no construction " can they be brought within the limited meaning of " 'charitable' as used in the law." And in the case of *Keren Kayemeth le Jisroel Ltd. v. Inland Revenue Commissioners* (2), the case of the Company established for the purpose of settling Jews in Palestine, Lord Macmillan, in reference to the argument that the settlement of Jews in Palestine was a purpose for the advancement of religion, says : " It has been suggested " that, while the transactions which may be entered " into and the operations which may be carried on are " ordinary enough operations of land acquisition, " settlement and development, nevertheless the motive " which is behind all these transactions and operations " is predominantly a religious motive. It may well " be that those who propose to carry on these activities " are in point of fact animated by religious motives, " but I am afraid that the income tax code applies a " a more objective test : it looks at the nature of the " transactions ; it looks at the character of the activi- " ties ; and it does not look behind these to what may " be the motive which has prompted the formation " of the company." Looking therefore to the uses which may in the present case legitimately be made from time to time of the trust premises or portions thereof under the provisions of the Trust Deed and

(1) [1939] A.C. 430, 435. (2) [1932] A.C. 650, 661.

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to the character of the various activities which under those provisions may from time to time be carried on in the premises, I am afraid that the trusts of the Deed cannot possibly be held to be charitable as being trusts solely for the advancement of religion.

Next as regards the contention that the trusts set out in the Deed are valid charitable trusts under the fourth head of Lord Macnaghten's classification in *Pemsel's case* (1), it is argued that the trusts, being for the benefit of an appreciably important section of the community, should be held to be valid charitable trusts under that fourth head. It is well settled, however, that Lord Macnaghten did not mean that all trusts for purposes beneficial to the community were charitable; but that there were certain charitable trusts which fell within that category. In order to bring a trust under this fourth head of Lord Macnaghten's classification it is essential to show that it is a charitable trust. (*In re Macduff* (2); *A. G. v. National Provincial and Union Bank of England* (3) per Viscount Cave, at p. 265, and Viscount Haldane at p. 267). Accordingly, when it is contended that a trust falls under this fourth head two quite separate questions must be asked and answered, first, "Is the trust for a purpose beneficial to the "community?" and second, "If it satisfies that first "test, is it charitable?" (per Lord Hanworth M.R. in *In re Grove-Grady* (4)). And I think it is equally well settled that in order to decide whether such a trust is a charitable trust or not we have to go back to what has been called the "spirit and intention" of the Statute 43 Eliz., c. 4 (*In re Macduff* (2), per Lindley L.J.; *General Medical Council v. Inland Revenue Commissioners* (5), per Rowlatt J. and Lord Hanworth M.R.; *Keren Kayemeth Le Jisroel Ltd. v. Inland Revenue Commissioners* (6) per Lawrence L.J.; *Peterborough Royal Foxhound Show Society v. Inland Revenue Commissioners* (7) per Lawrence J.; *Corporation of Foreign Bondholders v. Inland Revenue Com-*

(1) [1891] A.C. 531, 583.
(2) [1896] 2 Ch. 451, 467.
(3) [1924] A.C. 262, 265, 267.
(4) [1929] 1 Ch. 557, 571.
(5) (1928) 97 L.J.K.B. 578, 581, 585.
(6) [1931] 2 K.B. 465, 486.
(7) [1936] 2 K.B. 497, 501.

missioners (1) per Macnaghten J). The question then is, do the trusts of the Deed of 21st November, 1922, fall within the spirit and intention of the Statute of Elizabeth, or the Irish Statute 10 Car. I, sess. 3, c. 1. MacDermott J. in his very careful and closely reasoned judgment answers this question in the affirmative. He says : " One therefore comes back to the expressed " purpose of 'assisting and helping in the religious " 'moral social and recreative life' of the class speci- " fied. That is the pith and substance of the trust ; " and I think it may fairly be said that what it aims at " doing is to provide a community centre for the " Presbyterians of Londonderry and its environs, a " place where they can foregather in a Christian " atmosphere and pursue much that is commonly " reckoned as worth while in life. . . . One would " have to lead a very cloistered existence to-day not " to realise how much a hall or meeting place or centre " of this kind, reasonably appointed and governed, " can mean to the life of its neighbourhood." MacDermott J. accordingly holds that the trusts of the Deed of 21st November, 1922 conform to the legal conception of what is charitable. It is here that I find myself unable to agree. The objects of the trust may indeed be most admirable and worthy objects and a boon to the Presbyterian community in Londonderry. But I do not think that it necessarily follows from this that they are charitable objects. The objects of a trust may be in every way admirable and worthy and may be such as to conduce to the benefit of the public or of a substantial section of the public or of the inhabitants of a certain district and yet the trust may not in law be a charitable trust. A modern example is *In re King* (2), in which the Court had to consider gifts (*a*) for assistance in furthering any sports, games or pastimes benefiting a certain district, and (*b*) for assisting any musical or literary society in the district. Clauson J. (following the decision of Eve J. in *In re Gwyon* (3)—a case of an eccentric bequest for the purpose of providing certain articles of clothing for boys of a particular district) refused

(1) [1944] 1 K.B. 63, 67-68.
(2) [1931] W.N. 232.
(3) [1930] 1 Ch. 255.

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to hold that these were charitable gifts. And as Lord Hanworth M.R. pointed out in the passage in his judgment in *In re Grove-Grady* (1), to which I have already referred, a trust for a philanthropic purpose would satisfy his first question, "Is the trust for a "purpose beneficial to the community?" but would not satisfy his second question "Is it charitable?" for there may be philanthropic purposes which are not charitable. In the present case the purposes for which the trust premises may legitimately be used include the provision of social and recreational facilities for those connected with the Presbyterian Church in Londonderry district. Instances of such user are detailed in paragraph four of the Case Stated. No doubt there are cases such as *Shillington v. Portadown Urban District Council* (2) and *In re Hadden* (3), in which gifts for the purpose of providing the means of healthy recreation for the inhabitants of a particular district have been upheld as gifts for charitable purposes. The trusts, however, of the Deed of 21st November, 1922, are more widely drawn and would clearly authorise social and recreational activities of much more extensive scope than those contemplated in these two last mentioned cases. I see no reason why they would not authorise the playing of darts or billiards or the holding of dances or whist drives. The provision of facilities for activities such as these appears to me to be far removed from any purpose which can be considered as falling within the spirit and intention of the Statute of Elizabeth or which has been upheld as charitable by the Courts in any reported case. Accordingly I cannot hold that the trusts of the Deed of 21st November, 1922, are valid charitable trusts under the fourth head of Lord Macnaghten's classification in *Pemsel's case* (4), and it will also be gathered from what I have said that I cannot hold, as was contended in the alternative, that they are partly trusts for the advancement of religion and partly trusts falling under this fourth head.

It remains to refer to an argument which was sought to be founded upon such cases as *Goodman v. Mayor of*

(1) [1929] 1 Ch. 557, 571.
(2) [1911] 1 I.R. 247.
(3) [1932] 1 Ch. 133.
(4) [1891] A.C. 531, 583.

Saltash (1), and *Re Christchurch Inclosure Act* (2). It was contended that on the authority of these decisions the trusts in the Deed of 21st November, 1922, ought to be held to be charitable on the simple ground that they are trusts for the benefit of a class of the community, namely, those connected with the Presbyterian Church in the City of Londonderry and the surrounding districts. It is no doubt established by this line of cases that trusts expressed to be for the general benefit of a particular district or of the inhabitants of a particular place or of a particular class of such inhabitants are (or may be) held to be charitable. I agree with the view expressed in Tudor on Charities, 5th Ed., p. 45, that these cases are anomalous and that they cannot be related to the Statute of Elizabeth. If, however, the trusts are not simply for the *general* benefit of the district or of the class but are expressed to be for certain specified purposes, the Courts will examine those purposes and will hold the trusts void if the purposes are not purposes which the law regards as charitable. Trusts for specified non-charitable purposes will not be held to be charitable trusts simply because they are expressed to be for the benefit of the inhabitants of a particular locality or of a particular class of such inhabitants. (*In re Gwyon* (3), *In re King* (4).) Without, therefore, finding it necessary to express any opinion on the question whether the class intended to be benefited by the Deed of 21st November, 1922, constitutes a section of the community such that a trust for their benefit could be a valid charitable trust, but having come to the conclusion that the Trusts of the Deed are not in their nature purely charitable trusts, I am clearly of opinion that the case is not ruled in favour of the Trustees by the line of decisions typified by *Goodman v. Mayor of Saltash* (1), and *Re Christchurch Inclosure Act*, (2).

Appeal allowed.

Solicitor for the appellants: *F. C. MacNeice.*
Solicitors for the respondents : *Caldwell & Robinson.*

J. McC.

(1) (1882) 7 A.C. 633.
(2) (1888) 38 Ch.D. 520.
(3) [1930] 1 Ch. 255.
(4) [1931] W.N. 232.

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ESTATE OF GERALD HIGGINBOTHAM AND OTHERS (1). (N.I. 1928).

Land purchase—Vesting of holding in Land Purchase Commission —Turbary—Right of Commission to make regulations—Whether turbary rents payable to vendors of estate or to purchasing tenant of holding—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *section* 21—*Northern Ireland Land Act*, 1925 (15 & 16 *Geo.* 5, *c.* 34), *section* 26—*Northern Ireland Land Act*, 1929 (19 & 20 *Geo.* 5, *c.* 14), *section* 4.

The estate of H. vested in the Land Purchase Commission by virtue of the Northern Ireland Land Act, 1925. On 15th May, 1931, the date of such vesting, the holding of J. A. on the estate was held under a judicial tenancy. J. A. having died the Commission nominated C. A. to represent the tenant for the purposes of the sale and on 14th September, 1936, the holding was duly vested in C. A. by order of the Commission.

Prior to the vesting the vendors in exercise of their rights under the Land Law (Ireland) Act, 1881, section 5 (5), had made lettings of turbary on the holding to tenants of the estate and others. Some of these tenants enjoyed free turbary on the holding.

When the estate vested the Commission at the request of the vendors made temporary regulations with respect to the turbary on the holding pursuant to the Irish Land Act, 1903, section 21, and the Northern Ireland Land Act, 1925, section 26, continuing the existing practice of turbary lettings on the holding. The vendors did not make application to the Judicial Commissioner pursuant to the Northern Ireland Land Act, 1929, section 4 (1), to determine their claim to turbary on the holding.

In 1942 the Ministry of Finance prepared a scheme for the regulation of the said turbary on a permanent basis. The draft regulations proposed to be made by the Ministry provided for the payment to the vendors of annual turbary rents where the allottees paid rent, and for payment to C. A. of annual rents by way of compensation for interference caused to his holding by the exercise of the rights proposed to be conferred by the regulations.

C. A. objected to the regulations on the grounds that the vendors had not made application pursuant to the Northern Ireland Land Act, 1929, section 4 (1), for the determination of their claim to turbary on the holding, and that the holding had been vested in C. A. without any reservation of turbary in favour of the vendors. The matter was referred to the Chancery Judge.

(1) In the Chancery Division before Black J.

Held, that the Ministry—

1. Had not power to provide in regulations affecting the turbary on this holding for payment of turbary rents to the vendors because the vendors did not obtain a determination of their rights in the holding under the Northern Ireland Land Act, 1929, section 4 (1);

2. Had power to award such turbary rents to the proprietor of the holding upon just terms; and

3. Had power to award compensation to the proprietor of the holding for interference caused to the holding by the exercise of rights proposed to be conferred by the regulations on allottees who enjoyed free turbary on the estate prior to the sale.

Estate of Beresford-Ash [1928] N.I. 200 cannot now be considered law in view of section 4 of the Northern Ireland Land Act, 1929.

MEMORANDUM and questions of law referred for the decision of the Chancery Judge.

Prior to the sale of the above estate under the provisions of the Northern Ireland Land Act, 1925, a holding thereon was held by one John Anderson under a judicial tenancy created by a Fair Rent Order, dated 21st November, 1902. The holding was included in Final List No. 2209 published by the Land Purchase Commission, Northern Ireland, and on the 15th May, 1931, being the appointed day named in that Final List, it became vested in the Commission by virtue of Part II of the Northern Ireland Land Act, 1925.

John Anderson died on the 2nd January, 1936, and on the 16th March, 1936, the Commission nominated Clements Anderson to represent the tenant for the purposes of the sale. The holding was accordingly vested in Clements Anderson by Order of the Commission, dated 14th September, 1936. Until the appointed day the vendors and their predecessors had all the rights of entering upon the said holding for cutting and taking turf and of authorising other persons to do so which by section 5 (5) of the Land Law (Ireland) Act, 1881, are conferred on the landlord of a holding subject to a statutory term. In exercise of these rights the vendors and their predecessors were accustomed to make lettings of turbary on this holding to tenants of the estate and to others. Certain of the tenants were permitted to exercise this privilege free of charge, but in the majority of cases a rent was charged by the vendors, who reserved the right to let

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the turbary to any of their tenants or to others as they thought fit.

On the appointed day the power of the vendors to make such lettings ceased to be exercisable and the Commission at the request of the vendors and in exercise of its powers under the Irish Land Act, 1903, section 21, and the Northern Ireland Land Act, 1925, section 26, made temporary regulations as to the turbary on the holding. No application under the provisions of the Northern Ireland Land Act, 1929, section 4 (1), was made before the 14th September, 1936, by the vendors to determine their claim to turbary on the holding.

In 1942 the Ministry of Finance prepared a scheme for the regulation of the said turbary on a permanent basis and issued a draft of the regulations. These regulations provided for the payment to the vendors of such amounts as appeared to the Ministry to be just having regard to the rents that had previously been paid to the vendors in respect of turbary on the estate. The regulations also provided for the payment to Clements Anderson of annual rents by way of compensation for interference caused to the said holding by the exercise of the rights proposed to be conferred by the regulations. In the case of allottees who were tenants on the estate of the vendors and had formerly enjoyed free turbary thereon no rents were made payable by the regulations either to the vendors or to Clements Anderson. Clements Anderson objected to the regulations on the grounds, (1) that the vendors had not made application pursuant to the provisions of the Northern Ireland Land Act, 1929, section 4 (1), for the determination of their claim to turbary on the holding; (2) that the holding had been vested in him by the Commission without any reservation of turbary in favour of the vendors; and (3) that the regulations should not provide for any payment to the vendors, but that the entire turbary rents should be made payable to him as owner in fee simple of the holding. He applied to the Ministry of Finance under section 23 (1) of the Irish Land Act, 1903, to have the questions of law raised in his objections referred for the decision

of the Court. The following questions of law were referred for the decision of the Chancery Judge :—

1. Has the Ministry power to provide, in Regulations affecting the turbary in this holding, for payment of turbary rents to the vendors and their successors in title, having regard to the fact that the vendors did not obtain a determination of their rights in the holding under the provisions of section 4 (1) of the Northern Ireland Land Act, 1929 ?
2. If the answer to Question No. 1 is in the affirmative, is it essential that such Regulations should provide that any turbary rents thereby made payable should be paid to the vendors and their successors in title ?
3. If the answer to either Question No. 1 or Question No. 2 is in the negative, has the Ministry power to award such turbary rents to the proprietor of the holding ?
4. Has the Ministry power to award compensation to the proprietor of the holding for interference caused to the holding by the exercise of rights proposed to be conferred by the Regulations on allottees who enjoyed free turbary on the estate of the vendors prior to the sale ?

Curran K.C. for the Ministry of Finance.

Johnson for Clements Anderson, the proprietor of the holding.

The vendors did not appear and were not represented.

Cur. adv. vult.

BLACK J. BLACK J.: The relevant facts giving rise to the questions of law referred for determination in the present case are concisely set out in the memorandum submitted by the Ministry of Finance.

[His Lordship stated the facts above set out and continued] :—

The legal position in such circumstances under the old Land Purchase Acts is discussed at length in the

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judgments of the full Court of Appeal in *In re Scott's Estate* (1). After the completion of a sale to tenants under the provisions of those Acts the tenants' holdings became vested in them in fee simple, subject only as provided in the Acts. The landlord became wholly divested of all his interests in the holding including any right to cut and take turf. Section 21 of the Act of 1903 provided that where portion of a holding consisted of bog and the purchaser had not an exclusive right of turbary before the sale the Land Commission might make regulations authorising the cutting or making of turf on the bog by any occupier of land in the neighbourhood of the holding for whose requirements such turf appeared to be necessary, upon such terms as to payment or otherwise as might appear to them to be just. As the landlord's right to the turf had passed entirely from him and as no right or interest in respect of it remained either in the landlord or in the Land Commission, it would appear that any payments directed to be made in regulations framed by the Land Commission under the provisions of this section 21 of the Act of 1903 would necessarily fall to be made to the purchaser of the holding upon which the regulations authorised the cutting of the turf (*In re Scott's Estate* (2), per O'Connor M.R.).

Such then was the position prior to the passing of the Northern Ireland Land Act, 1925. Section 36 of this Act provided that it should be construed as one with the Land Purchase Acts. The Act did not contain any provisions purporting expressly to alter what had been understood since the decision of the Court of Appeal in *In re Scott's Estate* (1) to be the legal position in regard to turbary on bought out holdings or purporting to preserve for landlords any rights in respect of turbary on holdings after they have been vested in tenant purchasers, or purporting to enable the Land Commission in the future to include landlords who had enjoyed rights of turbary among those to whom payments might be directed to be made in regulations framed under section 21 of the Act of 1903. Section 26 of the Act of 1925 no doubt extends the power to

(1) [1916] 1 I.R. 180. (2) *ibid.* 213.

make regulations with respect to turbary. The power to make regulations is to include power to define the area on which the proprietor of the holding is to cut turf ; regulations may be made with respect to turbary on bog on any holding whether the proprietor of the holding had or had not an exclusive right of turbary before the sale ; regulations may be made with respect to turbary on any bog the property of the vendor or of the Commission on which rights or privileges of turbary were enjoyed prior to the sale ; and regulations may be made conferring and defining rights of access to the bog. This section 26, however, falls far short of purporting to alter expressly the position under which it had been held that under the provisions of the Irish Land Purchase Acts no right in respect of turbary was reserved to the vendor when an estate was sold to tenants under the Acts, and that the vendor was not included among the persons to whom payments might be directed to be made under regulations framed in pursuance of the power conferred by section 21 of the Act of 1903.

Under section 8 of the Act of 1925 all tenanted land in Northern Ireland with certain exceptions was to vest in the Northern Ireland Land Purchase Commission on the appointed day as if vesting orders had been made in pursuance of new purchase agreements for the purchase of same at the standard price. By section 9 of the Act the standard price of each holding was to be based on the standard purchase annuity for the holding as ascertained in accordance with the Third Schedule to the Act. And by the Third Schedule to the Act the standard purchase annuity for each holding is an annuity of an amount equivalent to a specified percentage of the judicial rent payable in respect of the holding. If, then, in the absence of express provision in the 1925 Act, the position in regard to turbary remained as it had been under the old Acts, namely, that all rights of turbary in respect of a holding passed from the vendor on a sale under the Acts, the result in a case like the present would be that the vendor would receive as the price of his interest in the holding a sum measured by refer-

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ence to the rent of the holding, but that he would receive nothing whatever by way of compensation for the loss of the turbary rights which he had owned. In some cases where the holding included a substantial acreage of bog which the vendor had been able to manage profitably the consequences might be unjust to a degree. An extreme instance will be found cited in the judgment of the Judicial Commissioner in *Estate of Beresford-Ash* (1). And the injustice could not be avoided as it might have been under the old Acts. For the 1925 Act is a compulsory Act, bringing about an automatic sale of all tenanted land (subject to the limited exceptions mentioned in the Act) at a price automatically fixed by reference to the previous rent of the holding. Under the 1925 Act there is no place for negotiation in regard to price or to conditions as there had been under the old Acts. In this state of affairs, there being no express provision made in the 1925 Act to protect a vendor who, in addition to receiving rent from his tenants, had also enjoyed an additional source of income by exercising valuable rights of turbary over the bogs on their holdings, it would appear that two possible views might be taken as to the effect of the Act in such cases. On the one hand it might be considered that such cases had simply been overlooked by the Legislature, that there was a *casus omissus* in the Act, that there was nothing to alter the principle established under the previous Acts that on the vesting of a holding in the Land Commission the landlord's rights in respect of turbary on the holding passed entirely from him, and that there was no provision in the legislation enabling him to receive any compensation for the loss of these rights. On the other hand it might be argued that the fact that under the Act of 1925 the sale by the owner was compulsory and that the purchase money did not include anything in respect of the owner's rights of turbary made an essential difference. It would be contended that one ought not to attribute to the Legislature such an act of legislative injustice as to sweep away these rights of turbary without a penny

(1) [1928] N.I. 200, 207.

of compensation. As Lord Esher once said, a judge ought to struggle with all the intellect he has, and with all the vigour of mind that he has, against an interpretation of an Act of Parliament which would involve a grave and palpable injustice. The matter came before Megaw J. (then Judicial Commissioner) for decision in *Estate of Beresford-Ash* (1). After reviewing the legislation in detail and notwithstanding what had been said in the Court of Appeal in *In re Scott's Estate* (2), and also in the earlier case of *In re King-Harman's Estate* (3), he found himself able to hold that the powers granted by section 21 of the Act of 1903 and section 26 of the Act of 1925 could be exercised in such a way as to take into account previous rights of the landlord of which no account had been taken in determining the purchase money, this being calculated merely on the basis of the amount of the fair rent. Accordingly he decided that while the turbary rights of the vendor were affected by the vesting of the holding in the Land Purchase Commission and the vendor could no longer make lettings of the unexhausted turbary on the holding, yet the Commission had power in regulations made under section 21 of the Act of 1903 and section 26 of the Act of 1925 to award compensation to the vendor by prescribing annual payments to be made by occupiers cutting or making turf or by prescribing other payments, annual or in gross, and that it was an essential of regulations which affected the turbary on the holding that they should provide for compensation to the vendor.

I am not sure that I would have found it easy to arrive at the solution which Megaw J. reached in *Estate of Beresford-Ash* (1). Inasmuch, however, as the jurisdiction which I am exercising in the present case is the jurisdiction exercised by the Judicial Commissioner in *Estate of Beresford-Ash* (1), I should consider it proper for me to follow the decision in that case unless I found that the position had been altered by subsequent legislation.

(1) [1928] N.I. 200.
(2) [1916] 1 I.R. 180.
(3) [1908] 1 I.R. 202.

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The basis of the decision in *Estate of Beresford-Ash* (1), as I understand it, was this. The Act of 1925 being a compulsory Act, bringing about automatically the sale of all tenanted land (with certain exceptions) at a price measured entirely by reference to the rent payable by the tenant of each holding, provided no opportunity for negotiation on the part of landlords who owned turbary rights over their tenants' holdings. There was no express provision to be found in the 1925 Act dealing specifically with the position of such landlords or purporting to alter their position under the previous Land Purchase legislation as it had been expounded by the Court of Appeal in *In re King-Harman's Estate* (2) and *In re Scott's Estate* (3). The learned Judicial Commissioner, however, in view of the situation created by the compulsory effect of the Act, was able to infer that the Legislature must have intended an alteration to take place and drew the conclusion that in the changed circumstances regulations made under the provisions of section 21 of the Act of 1903 ought to provide for payments to the landlord in respect of the turbary rights which he had previously enjoyed, even though it had become accepted that under the earlier legislation the making of payments to the landlord in respect of turbary rights did not fall within the scope of such regulations as might be made under section 21. All this was in the absence of any express provision in the Act of 1925 dealing specifically with the matter. If the Judicial Commissioner had found such express provision in the Act of 1925 his task would have been to construe that express provision as a part of the Land Purchase legislation. He would not have been driven to draw inferences from provisions not purporting to deal expressly with the specific point. And it might well have been that the terms of the express provision might have shown that any alteration of the principles accepted in *In re Scott's Estate* (3) which was necessitated by the compulsory nature of the 1925 Act scheme was to be found in the express provision itself.

(1) [1928] N.I. 200.
(2) [1908] 1 I.R. 202.
(3) [1916] 1 I.R. 180.

Although there was no express provision dealing with the matter in the 1925 Act, express provision dealing specifically with such rights enjoyed by the landlord before the vesting of a holding in the Land Purchase Commission was made in section 4 of the amending Act of 1929. Like the Act of 1925 the Act of 1929 is to be construed as one with the Land Purchase Acts. We must accordingly now construe the Act of 1925 as if it included section 4 of the Act of 1929. If in *Estate of Beresford-Ash* (1) the learned Judicial Commissioner had found in the 1925 Act a section in the terms of section 4 of the 1929 Act he would have turned primarily to that section to find what provisions the Legislature had thought fit to make in regard to landlords who had enjoyed turbary rights over their tenants' holdings. He would have found specific provisions in that section, and I think he would have had no difficulty in holding that those specific provisions were the provisions that the Legislature had intended to operate in regard to the matter without having recourse to inferences drawn from other provisions of the statute and from the nature of the subject matter. In other words, the learned Judicial Commissioner's reasoning in *Estate of Beresford-Ash* (1) depended on the absence from the 1925 statute of any specific provision dealing with the point. Once section 4 of the Act of 1929 was introduced into the code there was no room for such reasoning. The case of a landlord who had turbary rights over a tenant's holding is now dealt with expressly and specifically, and the provisions applicable to such a case are to be found in section 4.

Sub-section 1 of section 4 of the Act of 1929 provides that where the vendor of a holding vested in the Land Purchase Commission by the Act of 1925 claims that he was entitled to turbary rights of substantial value over the holding, then, if the Judicial Commissioner so determines, the holding shall continue to be subject to those rights after it has been vested in the Land Purchase Commission, and the vendor or the purchaser may, at any time before the vesting of the holding in

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the purchaser, apply to the Judicial Commissioner to determine the claim. Sub-section 2 of section 4 then enacts that the powers of the Land Purchase Commission and of the Ministry of Finance to make regulations with regard to turbary on bogs on holdings may be exercised notwithstanding that the holding is subject to a right or power determined in favour of the vendor under sub-section 1, and that where any such regulations affect any such right or power they shall include such terms as to payment or otherwise for the protection of the vendor as may appear to the Commission or to the Ministry of Finance, as the case may be, or as may appear to the Judicial Commissioner on appeal to be just.

The effect of section 4 accordingly is that a vendor who claims to have been entitled to turbary rights over a holding may establish a claim to retain those rights after the holding has become vested in the Land Purchase Commission, and that notwithstanding those rights the Ministry of Finance may make regulations in regard to the turbary on the holding under section 21 of the Act of 1903 and section 26 of the Act of 1925, but that such regulations shall include such terms as to payment or otherwise for the protection of the vendor as may be just. In substance this corresponds to what Megaw J. decided in *Estate of Beresford-Ash* (1). Under section 4, however, the continuance of the vendor's rights of turbary after the holding has become vested in the Land Purchase Commission depends upon his obtaining a determination of the Judicial Commissioner to this effect, and the only power under the section to apply to the Judicial Commissioner for such a determination is a power to apply "at any time before the vesting of the holding "in the purchaser." The Act of 1929 is to be construed as one with the earlier Land Purchase Acts, and in my view the effect of section 4 is that a vendor who had enjoyed rights of turbary over a holding, but who does not obtain a determination from the Judicial Commissioner under section 4, is left in the position which he would have been in under the decisions in

(1) [1928] N.I. 200.

In re King-Harman's Estate (1) and *In re Scott's Estate* (2). Moreover, I am of opinion that he must assert his claim by an application to the Judicial Commissioner before the vesting of the holding in the purchaser, and that if he fails to make such application before this vesting, all his rights in respect of turbary on the holding are gone. This is the only way in which, so far as I can see, any force or effect can be given to the words in section 4 (1) "at any time before the "vesting of the holding in the purchaser." In short, therefore, I hold that if a vendor claims to have enjoyed turbary rights over a holding, his only method of preserving those rights or of obtaining any compensation or payment in respect of them is now, since the passing of the Act of 1929, to make application to the Judicial Commissioner (or rather, since the passing of the Northern Ireland Land Purchase Winding Up Act, 1935, to the Chancery Judge) under the provisions of section 4 of the Act of 1929, and that such application must be made before the vesting of the holding in the purchaser.

Accordingly I answer the questions submitted to me as follows :—

Q. 1. No.
Q. 2. Does not arise.
Q. 3. Yes, but upon such terms as appear in the circumstances of the case to be just.
Q. 4. Yes, in so far as may appear in the circumstances of each case to be just.

Solicitor for the Ministry of Finance : *F. C. McNeice.*
Solicitors for Clements Anderson : *Shields & Murnaghan.*

M. V. P.

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DIVORCE—DESERTION—*Tacit consent by petitioner to respondent's departure—Desertion "without reasonable excuse"—Onus of proof—Matrimonial Causes Act (Northern Ireland)*, 1939 (2 & 3 *Geo.* 6, *c.* 13), *sec.* 2 (*b*). The petitioner and respondent intermarried in 1921. In 1929 the petitioner committed adultery with C, and in the next year gave birth to a child of whom C was the father. Thereafter the petitioner went to live at C's house where she was later joined by the respondent, and for six years the petitioner, the respondent and C lived together in the same house. In 1936 the respondent left the house and did not return. The petitioner did not protest at the respondent's departure, nor did she attempt to persuade him to remain or to return, and the Court found that the petitioner was a fully consenting party to the respondent's departure. *Held*, that the respondent did not desert the petitioner. A spouse who expressly or impliedly consents to the departure of the other spouse or who is not willing that the other spouse should remain in the matrimonial home cannot be held to have been deserted. *Held*, further, that assuming there to have been an act of desertion the onus was on the petitioner to establish that the respondent had left her without reasonable excuse, and that she had failed to discharge this onus. *Bacon v. Bacon.* [K.B.D. 110

DIVORCE — EVIDENCE — *Statements by spouses tending to prove accessor non-access—Application of Rule in Russell v. Russell.* The Rule in *Russell v. Russell* [1924] A.C. 687 which provides that neither spouse may give evidence of non-access after marriage to bastardize a child born in wedlock does not exclude evidence of admissions by a wife that she is with child by another where no evidence of non-access is given; for such admissions in the absence of evidence of non-access are incapable of bastardizing the child. *Warren v. Warren* [1925] P. 107 and *Roast v. Roast* [1938] P. 8 approved. The Rule in *Russell v. Russell* (supra) applies not only where the spouses are living together but also where they are separated either of their own volition or by decree or order of the Court. Where the spouses are living together or separated of their own volition a child born to the wife is presumed legitimate, but the husband may rebut this presumption by evidence other than his own. Where the spouses are separated by decree or order of the Court a child born to the wife at such date that it must have been conceived after the date of the decree or order is presumed bastard, but the wife may rebut this presumption by evidence other than her own. *Ettenfield v. Ettenfield* [1940] P. 96 approved. The Rule in *Russell v. Russell* (supra) does not exclude evidence by either spouse of non-access in order to rebut a defence of condonation, but such evidence can only be admitted on that issue and is not therefore available on the issue of adultery. *Park v. Park and McBride.* [K.B.D. 151

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FOOD AND DRUGS—*Sale of Milk—Adulteration—Article purchased for use and not for analysis—Certificate from official analyst condition precedent to prosecution—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict.*, *c.* 63), *secs.* 6, 10, 12, 13, 20, 21—*Jurisdiction of King's Bench Division in Northern Ireland.* The respondent was prosecuted by the appellant for selling to the appellant a quantity of new milk which was not of the nature, substance and quality demanded by the appellant, contrary to section 6 of the Sale of Food and Drugs Act, 1875, in that the milk was adulterated with water. The appellant prosecuted as a private purchaser and the milk had not been analysed by a public analyst under section 12 of this Act. At the hearing before the resident magistrate it was contended by the respondent that it was a condition precedent to a prosecution under section 6 of this Act that the article should be analysed by a public analyst and the analyst's certificate tendered in evidence, and the resident magistrate being of this opinion dismissed the charge but stated a case for the opinion of the King's Bench Division. *Held*, by the King's Bench Division (Black and MacDermott JJ.) that the resident magistrate was right in dismissing the

charge, and that the obtaining and production of the certificate of a public analyst is as indispensable a condition to prosecution where the prosecution is brought under section 6 at the suit of a purchaser for consumption or resale as it is where the prosecution is brought under section 13 at the suit of an officially appointed inspector. *R. (Barry) v. Mahony* [1909] 2 I.R. 490 followed. *Buckler v. Wilson* [1896] 1 Q.B. 83 not followed. Per Black J.: That the matter being one of doubt and the construction of the Act contended for by the respondent being a reasonably possible construction the point should be resolved in his favour on the ground that the Act was a penal Act. By the court: The King's Bench Division while holding itself entitled to reconsider decisions of the former Irish King's Bench Division will ordinarily follow such decisions unless clearly persuaded that they are wrong. *The Ministry of Agriculture for Northern Ireland, Appellant; Robert James Turtle, Respondent.* [K.B.D. 63

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INFANT—CUSTODY—*Husband and wife de facto separate—Conflicting claims advanced by both parents—Nothing in conduct or wishes of either parent to lead to any preference between them—Welfare of child chief consideration—Paramount right of father to custody—Guardianship of Infants Act, 1886, section 5.* A husband whose wife had left him and subsequently removed their child from his custody applied to the court by way of habeas corpus for the child's custody. There was nothing in the conduct or wishes of either parent to lead to any preference between them, or to enable the court to say that either was unfitted to be entrusted with the custody of the child. *Held*, that in the circumstances of the case the child's welfare would best be served by restoring him to the custody of his father. *Held*, further, that the father had superior rights at common law, that these had not been completely abrogated by the Guardianship of Infants Act, 1886, section 5, and that on this ground also the father was entitled to the custody of the child. *Campbell v. Cambpell* [1920] S.C. 31 and *Mackellar v. Mackellar* (1898) 25 R.883, followed. *In re B,. an Infant.* .. [K.B.D. 1

INSURANCE—MOTOR CAR—*Third party liability—Policy, by endorsement limited to insured and two named drivers—Driver not named in policy—Road accident—Judgments against owner and driver—Claims by injured third-parties to be indemnified—Validity of endorsement—Scope of insurer's liability—Public policy—Motor Vehicles and Road Traffic Act (Northern Ireland), 1930 (20 & 21 Geo. 5, c. 24), Part II, sections 6—17—Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 (24 & 25 Geo. 5, c. 15), sections 15, 18, 20.* The owner of a taxi was insured under a policy which indemnified in respect of all sums which the insured or any person in his employ driving on his order or with his permission might be legally liable to pay in respect of bodily injury to any person. By a subsequent endorsement attached to the policy it was stated that "no "claim shall attach to this Policy in "respect of any accident occurring "whilst the Insured Vehicle is being "driven by or is for the purpose of "driving in charge of any person other "than Insured [and two named "persons]." The plaintiffs were injured in a road accident by the negligence of the driver of the taxi. The driver was driving with the permission of and in the course of his employment by the insured, but he was not one of the two persons named in the endorsement on the policy. The plaintiffs having obtained judgments against the driver and the insured applied under section 18 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, for an order against the insurer to pay to the plaintiffs the sums payable under the judgments.

Held, that neither the insured nor the driver was covered by the policy in respect of the plaintiff's injuries. Meaning of the words "in respect of" any liability which may be incurred "by the insured" in section 7 (1) (*b*) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, as amended by section 15 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, considered. A policy of insurance complies with the requirements of section 7 (1) of the Act of 1930, as amended by section 15 of the Act of 1934, notwithstanding that it does not extend to give indemnity in respect of every person who may use the insured vehicle with the permission of the insured. *Sutch v. Burns* [1943] 2 All E. R. 441 not followed. *Goodwin and Another v. Leckey and Another.* [K.B.D. 40

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LANDLORD AND TENANT—LEASE —*Provision against assignment without Licence—Licence not to be unreasonably withheld — Proposed assignment — Licence refused without reason given—Declaratory Order—Reasonableness—Costs.* A lease contained a provision that the tenants should not sub-let, assign or otherwise part with possession of the premises without the consent in writing of the landlords or their agent, such consent not to be unreasonably withheld. The tenants agreed to sell their estate and interest in the premises to another and applied to the landlords for consent to the proposed assignment. The landlords refused to give their consent, and no reasons were given for this refusal. On a summons asking for a declaration that the landlords' refusal to consent to the proposed assignment was unreasonable. *Held*, that the power of the Court to make declarations of this type is not limited to cases where the landlord has given a reason which the Court considers to be bad, but that such declarations may also be made where the landlord has given no reason for his refusal. Withholding of consent to a proposed assignment cannot be reasonable unless there is the possibility that the landlord will be prejudiced as a consequence of such assignment. The mere fact that the premises will be put to some use other than that represented by the tenant or contemplated by the landlord at the time of the lease will not justify the landlord in withholding consent. *Harrison, Ainslie & Co. v. Barrow-in-Furness Corporation* (1989) 63 L.T. 834 doubted and distinguished. *Hervey-McLeay and Others v. Patton and Another.* [Ch.D.118

LAND PURCHASE — TURBARY — *Vesting of holding in Land Purchase Commission—Right of Commission to make regulations—Whether turbary rents payable to vendors of estate or to purchasing tenant of holding—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *section* 21—*Northern Ireland Land Act*, 1925 (15 & 16 *Geo.* 5, *c.* 34), *section* 26—*Northern Ireland Land Act*, 1929 (19 & 20 *Geo.* 5, *c.* 14), *section* 4. The estate of H. vested in the Land Purchase Commission by virtue of the Northern Ireland Land Act, 1925. On 15th May, 1931, the date of such vesting, the holding of J. A. on the estate was held under a judicial tenancy. J. A. having died the Commission nominated C. A. to represent the tenant for the purposes of the sale and on 14th September, 1936, the holding was duly vested in C. A. by order of the Commission. Prior to the vesting the vendors in exercise of their rights under the Land Law (Ireland) Act, 1881, section 5 (5), had made lettings of turbary on the holding to tenants of the estate and others. Some of these tenants enjoyed free turbary on the holding. When the estate vested the Commission at the request of the vendors made temporary regulations with respect to the turbary on the holding pursuant to the Irish Land Act, 1903, section 21, and the Northern Ireland Land Act, 1925, section 26, continuing the existing practice of turbary lettings on the holding. The vendors did not make application to the Judicial Commissioner pursuant to the Northern Ireland Land Act, 1929, section 4 (1), to determine their claim to turbary on the holding. In 1942 the Ministry of Finance prepared a scheme for the regulation of the said turbary on a permanent basis. The draft regulations proposed to be made by the Ministry provided for the payment to the vendors of annual turbary rents where the allottees paid rent, and for payment to C. A. of annual rents by way of compensation for interference caused to his holding by

the exercise of the rights proposed to be conferred by the regulations. C. A. objected to the regulations on the grounds that the vendors had not made application pursuant to the Northern Ireland Land Act, 1929, section 4 (1), for the determination of their claim to turbary on the holding, and that the holding had been vested in C. A. without any reservation of turbary in favour of the vendors. The matter was referred to the Chancery Judge. *Held*, that the Ministry—1. Had not power to provide in regulations affecting the turbary on this holding for payment of turbary rents to the vendors because the vendors did not obtain a determination of their rights in the holding under the Northern Ireland Land Act, 1929, section 4 (1); 2. Had power to award such turbary rents to the proprietor of the holding upon just terms; and 3. Had power to award compensation to the proprietor of the holding for interference caused to the holding by the exercise of rights proposed to be conferred by the regulations on allottees who enjoyed free turbary on the estate prior to the sale. *Estate of Beresford-Ash* [1928] N.I. 200 cannot now be considered law in view of section 4 of the Northern Ireland Land Act, 1929. *Estate of Gerald Higginbotham and Others.* .. [Ch.D. 208

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MASTER AND SERVANT—Common Employment—*Tram conductor injured by negligence of driver of another tram—Both vehicles units in one transport system—Liability of employer.* The plaintiff, a tram conductor employed by the defendant Corporation, was injured when a tram on which he was performing his duties was run into on the highway by another tram negligently driven by K. who was employed by the defendant Corporation as a tram driver. The two trams, which were units in the defendant Corporation's transport service, were based on different depots, but at the time of the collision both trams had been directed to the same area for relief duty in connection with heavy traffic of workmen proceeding to work. In an action for damages for personal injuries the defendant Corporation pleaded the defence of common employment. *Held*, that as the plaintiff and K. were concerned in the operation of vehicles which were units in the same system of transport and which were at the time of the accident engaged in the discharge of a particular duty which brought them into proximity with one another, they were in common employment and the action failed. *Metcalfe v. London Passenger Transport Board* (1939) 55 T.L.R. 700 not followed. *Adams v. Belfast Corporation.* [K.B.D. 160

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PRACTICE—INTERROGATORIES—*Issue joined—Whether affidavit necessary—Order xxxi, r.* 1. Where a plaintiff applies *ex parte* after issue joined for liberty to administer interrogatories it is not necessary that the application should be grounded on affidavit *Rowlands v. Hooper* (1892) 26 I.L.T.R. 131, and *Hannan v. Plunkett* (1892) 26 I.L.T. 304 not followed. *Robinson v. Chambers.* [K.B.D. 38

QUARTER SESSIONS—NOTICE OF APPEAL TO—*Defendant resident in Eire—Notices of appeal sent by registered post—Proof of service—"Ordinary course of post"—Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, sec.* 24. A., who resided in Eire, was served personally in Northern Ireland with two summonses for dealing with prohibited goods contrary to the Customs Consolidation Act, 1876, sect. 186, and the Export of Goods (Control) (No. 10) Order, 1943. On 9th August, 1944, at Petty Sessions, the summonses were dismissed. On August 12th, 1944, letters addressed to the defendant at his residence in Eire and containing notices of appeal against the respective orders made at Petty Sessions were posted by registered post. The County Court Judge declined to hear the appeals on the ground that the service of the notices was not good service. The appellant obtained a Conditional Order of a Writ of Mandamus directed to the County Court Judge commanding him to enter continuances upon and hear and determine the appeals. On motion to make absolute the Conditional Order notwithstanding cause shown. *Held*, that in the absence of evidence of the ordinary course of post between Northern Ireland and Eire, service of the notices of appeal on the defendant had not been proved. Service of notice of appeal under sect. 24 (3) (*m*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, on a person outside the jurisdiction considered. *R. (Petty) v. County Court Judge of Down.* [K.B.D. 12

RAILWAY—BREACH OF STATUTORY DUTY—*Private level accommodation crossing—Standard of maintenance—Increase of burden of easement—Railway Clauses Consolidation Act, 1845 (8 & 9 Vict., c.* 20), *section* 68. The obligation to maintain accommodation works under section 68 of the Railway Clauses Consolidation Act, 1845, is to be measured not according to modern standards of traffic but to those prevailing or contemplated at the time of construction. The plaintiff's farm was bisected by a line of the defendants' railway and the two parts were connected by a crossing made as an accommodation work pursuant to the provisions of the Railway Clauses Consolidation Act, 1845. A motor tractor and rake belonging to the plaintiff and in charge of his servants were caught in the rails as they were passing over the crossing and were run into by a train driven by the defendants' servants. In an action for damages for the destruction of the motor tractor and rake the plaintiff claimed that the loss was caused by a breach of statutory duty in that the defendants had not maintained the crossing as required by section 68 of the Railway Clauses Consolidation Act, 1845. The defendants contended that their duty to maintain the crossing was limited to maintaining it in a condition sufficient for the passage of traffic in use when the crossing was originally constructed, and that the plaintiff's claim to have the crossing maintained for the passage of modern farm machinery would substantially increase the burden of the easement. *Held*, that the plaintiff could not increase the burden of the easement by a user which altered or enlarged its character, nature or extent as enjoyed or acquired at the time of construction, and that the defendants' duty under the statute was only to maintain the crossing as a convenient passage for the kind of traffic which it was constructed to accommodate. *Held*, however, that the plaintiff's user of the crossing was not in fact such as to increase this

burden, and the accident having resulted from a failure to maintain the crossing as a convenient passage for the kind of traffic it was constructed to accommodate the defendants were accordingly liable. *West v. Great Northern Railway (Ireland)*. [K.B.D. 55

REVENUE—Income Tax—Charity —*Premises held on trust for assisting and helping in religious, moral, social and recreative life of members of church in a particular locality—Whether trust for charitable purposes only—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *section* 37 (1) (*a*)—*Finance Act*, 1921 (11 & 12 *Geo.* 5, *c.* 32), *section* 30 (1) (*a*). By a trust deed certain premises were vested in trustees "upon trust to "permit the same or any part thereof "to be used as a Hall for meetings or "for Social or Recreational purposes "in connection with the various Pres- "byterian Churches in the City of L. "and the surrounding district or as a "Hostel or Boarding House or as a "Library or for such other purpose or "purposes as the Board of Governors ". . . shall from time to time think "fit." The trust deed further declared its true intention and meaning to be that the premises should be used "for "the purposes of assisting and helping "in the religious, moral, social and "recreative life of those connected "with the Presbyterian Church in the "City of L. and surrounding district "in such manner as the Board of "Governors . . . shall from time to "time think right." The trustees claimed exemption from Income Tax on the ground that the trust under which the premises were held was a trust for charitable purposes only within section 37 (1) (*a*) of the Income Tax Act, 1918, and section 30 (1) (*a*) of the Finance Act, 1921, but this claim was rejected by the Special Commissioners who stated a case for the opinion of the High Court. MacDermott J. held that the trust was not one solely for the advancement of religion but that it was a trust for purposes beneficial to a section of the community within the fourth category of charitable trusts enumerated by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891], A.C. 531, 583, and that accordingly the trust was one for charitable purposes only. *Held*, by the Court of Appeal (Andrews L.C.J., Babington L.J. and Black J.)—(1) that the trust was not one solely for the advancement of religion because on the true construction of the trust deed the premises could be used for purposes which were merely social or recreative and which were not purposes "assisting and helping" in the religious life of those intended to be benefited by the trust, and further because purposes "assisting and help- "ing" in the religious life of those intended to be benefited by the trust included activities which whilst indirectly furthering a religious purpose were not directly religious; and (2) that the trust did not fall within the fourth category in *Pemsel's case* (supra) because its purposes even if beneficial to a section of the community were not within the spirit and intention of the Statutes of Charitable Uses (43 Eliz., c. 4 and 10 Car. 1, sess. 3, c. 1 (Ir.).) *Quaere* whether a class of persons ascertained by reference to their connection with a particular religious denomination can be regarded as a section of the community within the fourth category of *Pemsel's case* (supra). Decision of MacDermott J. reversed. *Trustees of Londonderry Presbyterian Church House v. Commissioners of Inland Revenue*. [C.A. 178

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TRADE DISPUTE—CROWN SERVANTS—*Civilian Employees of Air Ministry—Trade Disputes and Trade Unions Act (Northern Ireland)*, 1927 (17 & 18 *Geo. 5, c. 20), section 6—Crown not bound by Statute—Legislative powers of Parliament of Northern Ireland—"Air "Force matter"—Government of Ireland Act*, 1920 (10 & 11 *Geo. 5, c. 67), section* 4 (1). Section 6 of the Trade Disputes and Trade Unions Act (Northern Ireland), 1927, provides that "it shall not be lawful for any "local or other public authority . . . "to impose any condition upon "persons employed by the authority "whereby employees who are or who "are not members of a trade union "are liable to be placed in any respect "either directly or indirectly under "any disability or disadvantage as "compared with other employees." The Air Ministry during the War agreed with certain trade unions to employ Government-trained civilian mechanics (called "dilutees") on skilled work previously done by apprentice-trained craftsmen, the Air Ministry undertaking that when skilled labour became available the former practice would be restored. In pursuance of this undertaking the Air Ministry in 1945 gave instructions that where skilled craftsmen became available for employment at any unit the "dilutees" should be discharged in numbers sufficient to provide for the absorption of the skilled men available. The plaintiffs were "dilutees" who had received notice of dismissal. It was contended by the plaintiffs that their dismissal was unlawful and in violation of section 6 of the Act. *Held*, that the plaintiffs were servants of the Crown, and that the Crown was not included in the words "other "public authority" in section 6 on the grounds (i) that it would require a very clear expression in an Act of the Parliament of Northern Ireland that the intention was to bind the Crown where the result would be to affect the Crown's administration of its Imperial Departments, and (ii) that the general words "other public "authority" following the particular mention of local authorities could not be deemed to include departments of State which are of a higher nature than local authorities. *Semble*, that even if section 6 did purport to bind the Crown it would by virtue of the limitations placed on the legislative

powers of the Parliament of Northern Ireland by section 4 (1) of the Government of Ireland Act, 1920, be ineffective to control the actions of the Crown in any matter relating to the armed forces of the Crown. *Morton and Others v. Air Ministry and Another.* [Ch.D. 136

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WILL—CONSTRUCTION—*Sums to be set aside to produce "* £500 *per year "free of taxes" and* £1,000 *per year "free of tax"—Whether annuities or income—Investment of funds—Basis of calculation—Recovery by trustees of overpayments to beneficiaries—Direction to pay "free of taxes" referable to United Kingdom taxes only.* A testator gave his residuary estate to trustees in trust for J.D. for life and thereafter for such of the children or remoter issue of J.D. as J.D. should by deed or will appoint. J.D. by his will in exercise of the power directed the trustees to set aside sums of money sufficient (1) "to "produce £500 per year free of taxes "and pay the same by quarterly "instalments" to W.D., and after the death of W.D. to hold "the capital "and interest" for R.D. absolutely; (2) "to produce £500 per year free of taxes and pay the same by quarterly "instalments" to M.R., and after the death of M.R. to hold "the capital "and interest" for R.D. absolutely, and he directed that during the minority of M.R. the "income" was to be paid to her guardian; (3) to "produce £1,000 per year free of tax" payable to V.D. for the benefit and maintenance of U.D., and after the death of V.D. the trustees were to "pay whatever portion of the income" they thought necessary for the benefit of U.D., and after the death of U.D. to hold "the capital and unexpended "income (if any)" for R.D. absolutely. The trustees did not set aside sums of money as directed by the appointor, but had paid the clear yearly sums of £500 each to W.D. and M.R., and had paid the clear yearly sum of £1,000 to V.D. until her death, and thereafter had paid such sums as they considered necessary for the benefit of U.D. W.D. had at all times since the death of J.D been resident out of the United Kingdom, and it was contended in the case of his appointment that the expression "free of taxes" should be construed to mean free of such taxes as might be locally imposed in the place where he was for the time being residing. *Held,* (1) that upon the true construction of the appointments contained in the will of J.D. the appointees were not entitled to annuities of the specified amounts free of tax at the rate in force in any year, but that it was the duty of the trustees to set aside and invest in long dated or irredeemable trustee investments sums sufficient to produce the amounts of £500, £500 and £1,000 free of United Kingdom income tax at the rate in force at J.D.'s death, and to pay the income of these sums to or for the benefit of the appointees during their lifetimes, and subject thereto to hold the capital in trust for R.D. (2) that in calculating the sums so to be set aside the trustees should take into account any exemptions, rebates or other reliefs in respect of income tax to which the appointees would be entitled at the death of J.D., so that the yearly incomes of the appointees should be increased by £500, £500 and £1,000 respectively and no more. The principle of *In re Pettit* [1922] 2 Ch. 765 applies unless the settlor has expressly or by necessary inference excluded its operation. (3) that the trustees, having paid the appointees more than the appointees were entitled to receive, were entitled to recoup themselves the amounts which they had overpaid by deductions from future payments. (4) that the expression "free of taxes" in a will made in the United Kingdom by a testator residing in the United Kingdom refers to taxes imposed by the law of the United Kingdom in the absence of a contrary intention. *In re Norbury* [1939] Ch. 528 followed. *In re Dunville, Brownrigg and another v. Dunville and others.* [Ch.D. 90

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